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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 139

NATIONAL PLATE AND WINDOW GLASS COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

NATIONAL PLATE AND WINDOW GLASS COMPANY, INC., *Petitioner*, v. UNITED STATES OF AMERICA, *Respondent*.	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled proceeding on April 7, 1958.

Citations to Opinion Below

On June 27, 1957, the U. S. District Court for the Eastern District of New York granted petitioner's motion to quash a Commissioner of Internal Revenue Summons duces tecum issued pursuant to Section 7602 of the U. S. Internal Revenue Code of 1954. No written opinion was given by Chief Judge Robert Inch of the U. S. District Court for the Eastern District of New York, the motion to quash being granted by endorsing petitioner's motion papers. The opinion is not officially reported (R. 74). The opinion of the U. S. Court of Appeals reversing the U. S.

District Court (dated April 7, 1958) (R. 76-78) printed in Appendix "B", reported at 1 AFTR 2d page 58-1373.

Jurisdiction

The judgment of the U. S. Court of Appeals was entered on April 7, 1958 (R. 76-78) p. 19 *infra*. Rehearing was denied on April 28, 1958. Jurisdiction of this Court is involved under Title 28, U. S. Code, Section 1254(1).

By stipulation between the parties it has been agreed that the enforcement of the order of the U. S. District Court for the Eastern District of New York upon the issuance of mandate by the U. S. Court of Appeals for the Second Circuit, which reversed the order of the U. S. District Court quashing the Commissioner of Internal Revenue Summons issued under Section 7602 of the U. S. Internal Revenue Code of 1954, will be stayed pending the filing with the U. S. Supreme Court on or before June 30, 1958 of a Petition for a Writ of Certiorari and until such time as the Supreme Court of the United States makes disposition of such petition.

Questions Presented

1. When a deficiency in tax is determined by the Commissioner of Internal Revenue for a taxable year by the issuance of a "90-day letter" under Section 6212(a) of the Internal Revenue Code of 1954, and a petition for a redetermination thereof is filed in the Tax Court of the United States:

(a) May the Commissioner issue a valid and constitutional "summons" for the taxpayer's books and records and to give testimony for the same year under the general power provided in Section 7602 of the

Internal Revenue Code of 1954, without regard to the rules and regulations of the Tax Court governing the issuance of subpoenas for the records of litigants and taking of testimony?

(b) Does Section 6212(c) of the Internal Revenue Code of 1954 prohibiting the Commissioner from making any additional deficiency for the same year involved in the Tax Court, except for fraud, vest in the Tax Court exclusive jurisdiction to determine and redetermine the correct tax liability including the procedures to be followed in asserting such deficiency by the Commissioner?

2. To obtain an examination of the books and records of a taxpayer for a year before the Tax Court of the United States, on the ground of alleged fraud under the exception provided in Section 6212(c), is the Commissioner required only to show a bona fide suspicion of fraud, as held by the Court below, or must he establish to the satisfaction of a Court that he has probable cause or a reasonable basis to believe fraud exists as held by the First and Ninth Circuits?

3. Where an examination has already been made, must the Commissioner comply with Section 7605(b) of the Internal Revenue Code of 1954 in issuing a summons under Section 7602?

Statutes and Regulations and Constitution of the United States

The Statutes, Regulations and applicable Constitutional provisions are separately set forth in Appendix "A" attached to the petition.

Statement

On May 22, 1957, the taxpayer, National Plate and Window Glass Co., Inc., was served with a Commissioner of Internal Revenue Summons duces tecum by Special Agent James A. Duffy; requiring its president to appear and give testimony and produce all books, papers, records and documents for the fiscal years ended August 31, 1953 to August 31, 1956 inclusive. The exact details are set forth in Record below (R. 72).

The taxpayer made a motion on June 4, 1957 in the U. S. District Court for the Eastern District of New York to quash a Commissioner of Internal Revenue Summons duces tecum with respect to the fiscal year ended August 31, 1953 (R. 50); the years 1954 to 1956 inclusive were not involved as the books and records had been made available to the Commissioner's agents.

In a contested hearing before Chief Judge Robert Inch the taxpayer and the respondent filed Memoranda of Facts and Law and thereafter, on June 27, 1957, Judge Inch entered a memorandum decision without opinion granting taxpayer's motion to quash (R. 74).

The respondent filed its Notice of Appeal with the U. S. Court of Appeals for the Second Circuit on August 27, 1957 and on April 7, 1958, the U. S. Court of Appeals for the Second Circuit reversed the order of the District Court. A petition for a rehearing was filed on April 18, 1958 by the taxpayer. Said petition for rehearing was denied on April 28, 1958.

The basic facts in this case may be summarized as follows:

1. The taxpayer duly filed its Federal Income tax return for the fiscal year ended August 31, 1953 with the District Director of Internal Revenue for the District

of Brooklyn, N. Y. and paid the tax shown thereon (R. 60).

2. In connection with an investigation of another corporation, S. Kirschner & Sons, Inc., whose stockholders were the principal stockholders of the taxpayer, Special Agent Murray Waldman of the Intelligence Unit of the Internal Revenue Service, subpoenaed on April 3, 1956 the work sheets of the accountant for that taxpayer and in connection therewith obtained the work sheets of that accountant pertaining to this taxpayer for the fiscal year ended August 31, 1953 and for other years (R. 65).

3. The taxpayer's return for the fiscal year ended August 31, 1953 was under investigation of the Commissioner of Internal Revenue's agents from June 7, 1956 through November 14, 1956, the date of issuance of the statutory notice of deficiency (R. 70, 71), and on or about October 22, 1956, Revenue Agent Uberall of the Office of the District Director of Internal Revenue, Upper Manhattan District, New York, requested a waiver of the Statute of limitations (Form 872) to be signed covering the fiscal year ended August 31, 1953. The taxpayer through its attorney offered the books and records of the taxpayer for examination with the request that the examination be completed within the statutory period of limitations (R. 58).

4. On November 14, 1956, the Commissioner of Internal Revenue issued a 90-day statutory notice of deficiency covering the fiscal year ended August 31, 1953, wherein it stated that on "the basis of information on file with the Internal Revenue Service", the Commissioner disallowed all deductions claimed on the return as not having been substantiated (R. 63-64).

5. On February 7, 1957, taxpayer filed its petition with the Tax Court of the United States (R. 59).

6. Neither in the 90-day statutory notice of deficiency of November 14, 1956 nor in the Answer of the Commissioner of Internal Revenue filed on April 4, 1957 with the Tax Court of the United States was an issue of fraud raised (R. 63-64).

7. On June 19, 1957, at the Arguments of the Motion in the U. S. District Court to quash the Commissioner of Internal Revenue summons, it was agreed by counsel for the parties that the years 1954, 1955 and 1956 were not involved in this motion, because the taxpayer had complied; and the records for those years had been submitted to the defendant's agents. Argument and brief in the District Court was therefore confined to the year 1953 only.

The U. S. Court of Appeals for the Second Circuit reversed the order of the U. S. District Court holding "that the subpoena power vested in the Secretary or his delegate by 26 U. S. C. A. 7602 was not extinguished when the taxpayer filed his petition for review of a deficiency asserted by the Commissioner of Internal Revenue with the Tax Court of the United States, and that the power of the Tax Court to increase a deficiency under Section 6214 coupled with the subpoena power under Section 7602 entitled the Commissioner to exercise this subpoena power despite the fact that the case was before the Tax Court of the United States", citing *Bolich* v. *Rubel* (C. A. 2, 67 F. (2d) 894).

The Court below denied that Section 6212(c) which prohibits the determination of additional deficiencies "except in case of fraud" proscribes the right of the Commissioner to use the subpoena to ascertain whether fraud exists, citing *Boren* v. *Tucker*, (C. A. 9), 239 F. (2d) 767; *Application of United States (Carroll)* (C. A. 2), 246 F. (2d) 762; in the *Matter of Levine*, (C. A. 2), 243 F. (2d)

175; and in *Norda Essential Oil & Chemical Co.* v. *United States,* 230 F. (2d) 764.[1]

The U. S. Court of Appeals further decided that Section 7605 was not involved in this proceeding since the determination set forth in the deficiency notice did not constitute an examination within the meaning of Section 7605(b).

Reasons for the Granting of the Writ.

1. The decision of the Court below deprives the Tax Court of the United States of its exclusive jurisdiction to determine and redetermine the correct tax at issue in accordance with the procedures laid down by that Court.

Under the Revenue Act of 1926, Section 274(e), Congress intended to provide the Board of Tax Appeals (now the Tax Court of the United States) with exclusive and complete jurisdiction to determine the correct tax liability for a given year where a petition had been filed with that body. The legislative history indicates that in creating this body the "jurisdiction of the Board is similar to that heretofore held by judges of the Federal District Courts." H. Rep. #1, 69th Congress, 1st Sess., p. 17, S. Rep. #52, 69th Congress, 1st Sess. p. 37.

Complete power was given to this body to prescribe, by appropriate rules, the procedures by or under which issues were to be litigated and determinations made. (Sec. 7453, 1954 I. R. C.) Cf. *Goldsmith* v. *Board,* 270 U. S. 117.

The right of the Commissioner to claim an increased deficiency in the Board of Tax Appeals was provided for

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[1]The Court below erred in the facts of the instant case in citing *Norda Essential Oil & Chemical Co.* v. *United States, supra.* The only issue involved here is the books for the 1953 tax determination. Tax for the subsequent year has already been determined from examination of the books and records, and the books and records for 1953 were not needed for that purpose. See Petition for Rehearing, record pages 83, 95.

the first time in Section 274(e) of the Revenue Act of 1926 (now contained substantially the same in Section (6214(a), I. R. C. 1954). However, any such claim of increased deficiency could only be made by the Commissioner in accordance with the rules prescribed by the Board of Tax Appeals. Conference Comm. Rep., 69th Congress, 1st Sess. H. Rep. 356, amend. #63, p. 40.

The Tax Court of the United States has such jurisdiction as has been conferred upon that body and its predecessor under prior acts, including the Revenue Act of 1926. Sections 7442 and 7453 of Internal Revenue Code of 1954. Specific power to issue subpoenas for the books and records of litigants before it was given the Tax Court. Section 7456, I. R. C. 1954. Indeed, that the Commissioner availed himself of that power by obtaining a subpoena for a taxpayer's books and records from the Board of Tax Appeals is apparent in *United States et al* v. *Union Trust Co.*, 13 F. Supp. 286. Obviously, the materiality and relevancy of any subpoena is best determined by that body which is given the jurisdiction to determine the tax liability.

Congress provided for a specific representative of the Treasury Department to appear for it in the Tax Court. Sec. 7452, I. R. C. 1954. Only such party was given authority, therefore, to obtain the right of subpoena. A Special Agent of the Intelligence Division is not such an authorized person. His function is solely to determine whether facts exist to warrant criminal prosecution. Par. 678 of Internal Revenue Agent Manual of Instructions; *United States* v. *Wolrich*, 129 F. Supp. 528 (S. D. N. Y. 1955); *United States* v. *Manno*, 118 F. Supp. 511 (D. C. Ill. 1954). Nevertheless, the Court below held that the Special Agent's "Summons" was for the possible purpose of asserting an increased deficiency before the Tax Court.

Indeed, the exclusive power in the Tax Court to determine the correctness of the deficiency proposed by the Com-

missioner left the Commissioner without any further power under Section 7602 of the Internal Revenue Code of 1954. That section literally permits a "summons" to be issued for the books and records in order for the Commissioner to determine the correctness of a tax return. Since that issue has been transferred to the sole and exclusive jurisdiction of the Tax Court, the "summons" of the Special Agent was invalidly issued and constitutes a violation of the Fourth Amendment to the Constitution of the United States.

The Commissioner's action, sustained by the Court below, is violative of Rules 44 and 45 of the Tax Court which sets forth its own procedures for summons and depositions. The latter rule [45(c)] specifically prohibits depositions and testimony before either party in a case before the Tax Court without the consent of the opposing party. What the Commissioner in effect has obtained from the Court below is the right to examine witnesses and records before the trial of the case and to adduce the evidence to be presented. This is a procedure not provided for in any rule of the Tax Court and is specifically prohibited in Rule 45. Cf. *Joseph Starr* v. *Commissioner of Internal Revenue*, 226 F. (2d) 721 (C. A. 7).

The decision of the Court below completely frustrates this exclusive power of the Tax Court by permitting the Commissioner to issue a "summons" independently and without regard to the specific right of the Tax Court as provided by Congress.

2. The decision of the Court below violates the intention of Congress to limit examinations of the books and records of taxpayers as indicated in Section 6212(c) of the Internal Revenue Code of 1954, which prohibits the issuance of further deficiency notices, once a case is before the Tax Court of the United States, except for fraud.

Examination of a taxpayer's books and records is to enable the Commissioner of Internal Revenue to ascertain

the correctness of the tax returns filed, and where necessary determine a deficiency. However, once the issue is before the Tax Court no further deficiencies may be determined by the Commissioner, except for fraud. (Sec. 6212(c) of I. R. C. of 1954). After that the correct tax determination is vested in the Tax Court. It is therefore clear that if the Commissioner may not determine additional deficiencies where a case is pending in the Tax Court and examinations of books and records are only for the purpose of determining correctness of tax and possible deficiencies in tax, that the Commissioner may not re-examine a taxpayer's books and records in a case before the Tax Court except in accordance with procedures laid down by that Court. Section 6214 giving the Tax Court the right to determine an increased deficiency upon the claim of the Commissioner does not nullify Section 6212(c) which would be the effect of the decision of the Court below.

3. The above issues are of tremendous importance in the administration and adjudication of tax controversies as to the power of the Commissioner of Internal Revenue versus the power of the Tax Court of the United States to control its own procedures and the litigants before it.

The scope and importance of these issues may be recognized from the fact that there are now thousands of cases presently pending before the Tax Court and thousands of new cases are docketed each year in all of which records could be re-examined as often as the Commissioner of Internal Revenue desires in accordance with the decision of the Court below.

4. The prohibition against the determination of additional deficiencies by the Commissioner in a proceeding before the Tax Court of the United States, as provided in Section 6212(c), except in the case of fraud, will be circumvented where the existence of the possibility of fraud

is alleged by the Commissioner without any showing of reasonable cause for such belief. In this respect, the decision of the Court below is in conflict with *O'Connor* v. *O'Connell*, 1 AFTR 2d page 58—1209 (C. A. 1), *Martin* v. *Chandis Securities Co.*, 128 F. (2d) 731 (C. A.-9).

The Court below referred to the possibility of fraud existing in the instant case as additional reason for enforcing the Commissioner's summons. From the record it is evident that the referral to possible fraud was based solely upon an administrative affidavit of a Commissioner's agent. No specific showing of a reasonable basis for the belief that fraud exists was offered to the District Court, Eastern District of New York, and therefore that Court properly quashed the summons.

The U. S. Court of Appeals, First Circuit, has taken issue with the position of the Court below (Second Circuit) on this very point in *O'Connor* v. *O'Connell, supra*, when it stated the taxing authorities "must establish to the District Court's satisfaction that a reasonable basis exists for a suspicion of fraud, or put another way, that there is probable cause to believe the taxpayer was guilty of fraud." Here the District Court was not so satisfied and as of this date no allegation of fraud has been raised in the Tax Court proceeding. See also *Martin* v. *Chandis Securities Co., supra.*

5. The decision below is wholly contrary to Section 7605(b) of the Internal Revenue Code of 1954, limiting unnecessary examinations except as therein specifically provided.

The Court below rejected the taxpayer's argument that the determination of its tax liability by the Commissioner for 1953 was based upon an examination of its accountant's analysis and work papers of its records (R. 65) and that such examination was one within the meaning of Section

7605(b) of the 1954 Code. There is nothing in the statutes that require the examination to be of any specific records. Cf. net worth and expenditure methods of determining net income which often ignore taxpayer's books and records.

If such examination as was made was one within the purview of Section 7605, it was incumbent upon the Secretary of the Treasury or his delegate, the Commissioner of Internal Revenue, to send a letter advising a re-examination for 1953 was required. Sec. 7605(b). This was not done.

If the Court below is correct in holding that no examination was previously made prior to the issuance of the "90-day letter" (R. 55, 58, 69) within the meaning of Section 7605, then the Commissioner's action in issuing a statutory notice of deficiency, after being invited to examine the records on October 24, 1956 (R. 58) was an arbitrary and capricious act to evade the specific requirements of the Statute of Limitations providing for tax determinations within three years after the return is filed. Sec. 6501(a) of the 1954 Code.

Congress surely intended to treat taxpayer and Commissioner alike with regard to the provisions of the Statute of Limitations. To recognize arbitrary and capricious deficiency determinations by the Commissioner as a vehicle for tolling the Statute of Limitations is a direct circumvention of Congressional intent. It nullifies the statute as far as the Commissioner is concerned but would retain it against the taxpayer. That the Commissioner's action was arbitrary and capricious and solely a vehicle for illegally tolling the Statute of Limitations is seen from the nature of the proposed adjustments—all deductions claimed on the 1953 tax return were disallowed (R. 59, 60). Such arbitrary action is not a true determination of a deficiency and does not affect the running of the Statute of Limitations. *Brown* v. *N. Y. State Tax Commission*, 99 N. Y. S. 2d 73.

This being so the Statute of Limitations ran with regard to the fiscal year ended August 31, 1953 on November 15, 1956 and any deficiencies in tax for that year are barred by the Statute; and the law as expressed in *Zimmerman et al* v. *Wilson* (C. A. 3) 81 F. (2d) 847; *Farmers & Mechanics National Bank et al* v. *United States* (C. A. 3) 11 F. (2d) 348; in re *Andrews Tax Liability*, 18 F. Supp. 804 (D. C. Md.) would apply.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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June 26, 1958

APPENDIX "A"

Statutes and Law Involved

CONSTITUTION OF THE UNITED STATES

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U. S. INTERNAL REVENUE CODE OF 1954

Section 6212—*Notice of Deficiency*

(a) In General. If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B he is authorized to send notice of such deficiency to the taxpayer by registered mail.

(c) Further Deficiency Letters Restricted.

(1) General Rule.—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in Section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, or of estate tax in respect of the taxable estate of the same decedent, except in the case of fraud, and except as provided in Section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in Section 6213(b)(1) (relating to mathematical errors), or in Section 6861(c) (relating to the making of jeopardy assessments).

Section 6214—

(a) Jurisdiction as to increase of deficiency, additional amounts, or additions to the Tax.—The Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or addition to the tax shall be assessed, if claim therefor is asserted by the Secretary or his delegate at or before the hearing or a rehearing.

Section 6501—*Limitations on Assessment and Collection*

(a) General Rule. Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within three years after the return is filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, within three years after such tax became due, and no proceeding in Court without assessment for the collection of such tax shall be begun after the expiration of such period.

Section 7442—*Jurisdiction*

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3 and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stst. 10-87), or by laws enacted subsequent to February 26, 1926.

Section 7452—*Representation of Parties*

The Secretary or his delegate shall be represented by the Assistant General Counsel of the Treasury Department serving as Chief Counsel of the Internal Revenue Service, or the delegate of such Chief Counsel, in the same manner before the Tax Court as he has heretofore been represented in

proceedings before such Court. The taxpayer shall continue to be represented in accordance with the rules and practice prescribed by the Court. No qualified person shall be denied admission to practice before the Tax Court because of his failure to be a member of any profession or calling.

Section 7453—*Rules of Practice, Procedure and Evidence*

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable to trials without a jury in the United States District Court of the District of Columbia.

Section 7456—*Administration of Oaths and Procurement of Testimony*

(a) In General—For the efficient administration of the functions vested in the Tax Court or any division thereof, any Judge of the Tax Court, the Clerk of the Court or his deputies, as such, or any other employee of the Tax Court designated in writing for the purpose by the Chief Judge, may administer oaths, and any judge of the Tax Court may examine witnesses and require, by subpoena ordered by the Tax Court or any division thereof and signed by the Judge (or by the Clerk of the Tax Court or by any other employee of the Tax Court when acting as Deputy Clerk)—

(1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence and other evidence, from any place in the United States at any designated place of hearing.

* * * * *

Section 7602—*Examination of Books and Witnesses*

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) to examine any books, papers, records or other data which may be relevant to such inquiry;

(2) to summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account, containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) to take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Section 7605—

(b) Restrictions on Examination of Taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

REVENUE ACT OF 1926

Section 274(e)

The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax shall be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

MISCELLANEOUS

Committee Reports

House Rep. #1—69th Congress, 1st Session

Senate Rep. #52—69th Congress, 1st Session

Conference Committee Rep.—69th Congress 1st Session

U. S. TAX COURT RULES

Rule 44

Rule 45

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 290—OCTOBER TERM 1957

(Argued March 10, 1958 Decided April 7, 1958)

DOCKET No. 24913

NATIONAL PLATE & WINDOW GLASS CO., INC.,
Appellee,

v.

UNITED STATES OF AMERICA,
Appellant.

BEFORE:

CLARK, *Chief Judge,*

HINCKS, *Circuit Judge,* and BRENNAN, *District Judge*

The United States appeals from an order of the United States District Court for the Eastern District of New York entered without opinion by Inch, *Chief Judge,* granting the taxpayer's motion to quash service of a summons duces tecum issued under 26 U. S. C. § 7602. Reversed with direction.

BERNARD WEISS, New York, N. Y., for appellee.

MEYER ROTHWACKS, Attorney, Dept. of Justice, Washington, D. C. (Charles K. Rice, Asst. Attorney General, Lee A. Jackson and Harry Baum, Attorneys, Dept. of Justice, Washington, D. C.; Cornelius Wickersham, Jr., United States Attorney; and Lawrence G. Nusbaum, Jr., Asst. United States Attorney, Eastern District of New York, Brooklyn, N. Y., on the brief), for appellant.

Per Curiam:

The subpoena power vested in the "Secretary (of the Treasury) or his delegate" by 26 U. S. C. A. § 7602 to § 7605, was not extinguished when the taxpayer filed with the Tax Court his petition to review the Commissioner's asserted deficiency for the fiscal year 1953. Under 26 U. S. C. A. § 6214, the Tax Court has power to assess a deficiency greater than that originally determined by the Commissioner. And the subpoena powers provided by the above-cited sections of the Code of 1954 are available to support the Commissioner's position in the Tax Court. *Bolich v. Rubel*, 2 Cir., 67 F. 2d 894.

Nothing in 26 U. S. C. A. § 6212 purports to restrict the subpoena power of the "Secretary or his delegate" under the statutory provisions above cited. The restriction in § 6212 which prohibits the determination of additional deficiencies "except in case of fraud" does not proscribe resort to subpoena in an effort to ascertain whether fraud exists. Especially is that so when, as here, a possibility of fraud appears. *Boren* v. *Tucker*, 9 Cir., 239 F. 2d 767, at page 773. Cf. *Application of United States (Carroll)*, 2 Cir., 246 F. 2d 762, cert. den. 355 U. S. 857; and *In the Matter of Levine*, 149 F. Supp. 642, aff'd 2 Cir., 243 F. 2d 175. Moreover, the records sought below may well have been pertinent to investigation of the appellee's tax liability for 1954-1956. For those liabilities, so far as appears, no notice of deficiency had been mailed and no petition for review by the Tax Court had been filed. Consequently, § 6212 by its plain terms was inapplicable. *Norda Essential Oil & Chemical Co.* v. *United States*, 2 Cir., 230 F. 2d 764, cert. den. 351 U. S. 964.

Nor was the order below required because of the provisions of 26 U. S. C. A. § 7605(b), which without special authorization restricts the Internal Revenue Service to "only one inspection." The cursory examination of the taxpayer's

records on February 28, 1957 was not shown to have completed the investigation; it did not constitute an "inspection" within the meaning of this statute. Ten days thereafter the taxpayer refused access to the records. And any examination of the records prior to February 28, 1957 was incident to the investigation of another related corporation.

Taxpayer's contention that the summons was too broad must fail in the light of *Civil Aeronautics Board* v. *Hermann*, 353 U. S. 322. And his claim that the summons violates his constitutional privileges under the Fourth Amendment is wholly lacking in substance. *Bolich* v. *Rubel, supra.*

Reversed with a direction to deny the motion to quash and to enforce the summons.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL PLATE & WINDOW GLASS CO., INC.,
Appellee,

v.

UNITED STATES OF AMERICA,
Appellant.

Before CLARK, Chief Judge, HINCKS, Circuit Judge, and BRENNAN, District Judge.

On Petition for Rehearing.

Bernard Weiss, New York City, for appellee.

PER CURIAM.

Petition for rehearing denied.

C. E. C.
C. C. H.
U. S. C. JJ.

S. W. B.
U. S. D. J.

April 28, 1958

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 139

NATIONAL PLATE AND WINDOW GLASS COMPANY, INC.,
PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 74) is not reported. The opinion of the Court of Appeals (Pet. 19-21) is reported at 254 F. 2d 92.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1958. (R. 79.) Rehearing was denied April 28, 1958. (Pet. 22.) The petition for a writ of certiorari was filed on June 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that taxpayer's filing of a petition in the Tax Court, opposing

the Commissioner's determination and praying for a redetermination of its liability with respect to the fiscal year 1953, did not foreclose an investigation of the taxpayer's liability for that year, pursuant to Section 7602 of the Internal Revenue Code of 1954.

2. Whether the Court of Appeals correctly held that a cursory inspection of the taxpayer's books and records for the fiscal year 1953, prior to the issuance of a summons for their production, did not bar their further examination, as either unnecessary, or as a second inspection, within the meaning of Section 7605(b) of the Internal Revenue Code of 1954.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

* * * * *

(e) *Increase of Deficiency after Notice Mailed.*—The Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

Internal Revenue Code of 1954:

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

* * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7601.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing

entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7602.)

SEC. 7603. [As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87, and Sec. 208(d)(4), Federal-Aid Highway Act of 1956, c. 462, 70 Stat. 374]. SERVICE OF SUMMONS.

A summons issued under section 6420(e)(2), 6421(f)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

(26 U.S.C. 1952 ed., Supp. IV, Sec. 7603.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the

district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) [As amended by Sec. 4(i), Act of April 2, 1956, *supra*, and Sec. 208(d)(4), Federal-Aid Highway Act of 1956, *supra*]. *Enforcement.*—Whenever any person summoned under Section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * * *

(26 U.S.C. 1952 ed., Supp. IV, Sec. 7604.)

SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * * * * *

(b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary exami-

nation or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7605.)

STATEMENT

The District Court made no findings of fact; nor did the Court of Appeals summarize the facts. As stated in the affidavits filed in connection with the motion to quash (R. 54-57; 64-71), the facts pertinent to this appeal may be summarized as follows:

Prior to April 3, 1956, Revenue Agent Irving Uberall and Special Agent Murray L. Waldman, both of the Internal Revenue Service, had been engaged in an investigation of the tax liability of Samuel Kirschner and Sons, Inc., a corporation closely allied to National Plate and Window Glass Company, Inc., hereafter referred to as the taxpayer. Herbert Kirshner and Alvin Kirshner, who were under investigation by Special Agent Waldman in their individual capacities, were the principal stockholders in both corporations. The taxpayer, a middleman, purchased glass from factories, and distributed it to its own purchasers. Samuel Kirschner and Sons, Inc., a contractor, bought glass from the taxpayer. (R. 65-66.)

The investigation of Samuel Kirschner and Sons, Inc., revealed that it and the taxpayer had engaged in some highly questionable transactions. On April 3, 1956, Special Agent Waldman, in order to substantiate the records of Samuel Kirschner and Sons, Inc., ob-

tained from the accountant for both corporations certain worksheets relating to the taxpayer's fiscal year 1953, which had been used in preparing the taxpayer's return for the fiscal year 1953, and which showed that some income transactions had been omitted in reporting the taxpayer's reported gross income, and that inventory figures may possibly have been juggled so as to report a lesser amount of gross profits. (R. 66.) [1]

On June 7, 1956, Special Agent James A. Duffy was assigned to investigate the taxpayer's liabilities. He was in charge of the investigation, working in cooperation with Special Agent Waldman and Internal Revenue Agent Uberall. (R. 70-71.)

On October 19, 1956, with the statute of limitations about to run on the taxpayer's liability for the fiscal year 1953, Revenue Agent Uberall requested the taxpayer to execute a Form 872 extending to June 30, 1958, the time within which an assessment could be made for the fiscal year 1953. By letter dated October 24, 1956, the taxpayer's attorney advised the District Director that the taxpayer desired the Internal Revenue Service to examine its books for the fiscal year 1953 prior to the expiration of the statute of limitations period. On November 14, 1956, one day before the expiration date, the Commissioner forwarded a 90-day deficiency notice to the taxpayer. Thereafter, the taxpayer filed a petition with the Tax Court contesting the proposed deficiency for the fiscal year 1953, and requesting redetermination of its tax liability for that period. (R. 55.)

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[1] On May 3, 1956, the United States District Court for the Southern District of New York denied the accountant's motion for return of the worksheets to his possession. This matter was not at issue below, and is not before this Court.

On January 14, 1957, in connection with the investigation of Samuel Kirschner and Sons, Inc., Special Agents Duffy and Waldman visited the taxpayer's premises, and photostated certain of its ledger accounts. On February 28, 1957, the taxpayer was investigated for the first time with respect to its own liability when Special Agent Waldman made a cursory inspection of its books and records for the fiscal year 1953. This was done for the purpose of determining if the taxpayer had "made a fraudulent return" and whether there was "civil fraud" or "criminal fraud". On March 4, 1957, a third party was questioned with respect to the taxpayer's liability; the questioning revealed that a fraudulent transaction had occurred. Four days later, Special Agent Waldman visited the taxpayer's premises, but was denied the right to inspect documents for the fiscal year 1953. The taxpayer's agents had scotch-taped the taxpayer's records for that period, making inspection impossible. (R. 64-66.)

On May 22, 1957, Special Agent Duffy served upon the taxpayer's president a summons to testify on June 4, 1957, concerning the taxpayer's liabilities for the fiscal years 1953 through 1956, and to produce certain designated books, records and papers of the taxpayer. (R. 72-73.)

The period for complying with the summons with respect to the fiscal year 1953 was extended, by oral agreement, from June 4, 1957, to June 12, 1957. (R. 51-52.)

On June 4, 1957, the taxpayer filed notice that it would move the United States District Court for the Eastern District of New York to quash the summons. With the notice of motion it submitted the affidavit of its president, Herbert Kirshner. (R. 50-57.)

At the hearing on the motion, the affidavits of Special Agents James A. Duffy and Murray L. Waldman, and of Revenue Agent Irving Uberall were submitted on behalf of the United States. The affidavit of Special Agent Duffy showed that the summons was issued by him in the performance of his official duties; that the action taken had been authorized by his superiors in the Intelligence Division of the Internal Revenue Service; that the summons was not issued at the behest of, or for the benefit of, any other agency of the Government; and that in his opinion, the use of the summons in the investigation of the taxpayer's liability was "material and necessary for a proper determination of the tax liability of National Plate & Window Glass Company, Inc." (R. 70-71.)

Special Agent Waldman's affidavit stated that there were "reasonable grounds to suspect and probable cause to believe that the Taxpayer has committed fraud". In reaching this conclusion, the affidavit stated that the agent had relied upon the following facts: (a) the close relationship between the taxpayer and Samuel Kirschner and Sons, Inc., and the revelation, as a result of the investigation, that there were "some highly questionable transactions transpiring between" the two; (b) the disclosure, from a check of the work papers of the taxpayer's accountant for the fiscal year 1953 that there were "specific business transactions of the Taxpayer which were not included in the Taxpayer's gross income" or in its return; (c) the further disclosure, from the same work papers, that there had been "a possible juggling of inventory figures so as to report a lesser amount of gross profits"; and (d) the steady increase in the taxpayer's gross sales for the period 1951-1955, inclusive, as shown in its returns, compared with the

marked decrease in its gross profits, as computed from the returns. According to the affidavit, the documents specified in the summons were "extremely important to the investigation"; without their production "further investigation of the civil and criminal fraud must be suspended"; they were "both material and relevant" to the investigation, since they were "necessary to reconstruct the financial history of the corporation, and to ascertain exactly what items were included or excluded in the Taxpayer's return which should not have been included or excluded". Further, according to the affidavit, the work papers of the taxpayer's accountant covering the fiscal year 1953, and the interrelationship of the stockholders of Samuel Kirschner and Sons, Inc., and of the taxpayer, indicated "an overpowering likelihood that some or all of the requested documents" would "bear heavily" upon determination of the taxpayer's possible "civil and/or criminal fraudulent liabilities". (R. 64-68.) Revenue Agent Uberail's affidavit contained similar allegations. (R. 69.)

On June 12, 1957, the taxpayer moved to quash the summons in its entirety in so far as it applied to the fiscal year 1953; and, in so far as it applied to the remaining fiscal years 1954, 1955, and 1956, the taxpayer (see Notice of Motion, R. 53) requested the court to quash that part of the summons which "demands all correspondence files, and memoranda of the National Plate & Window Glass Co., Inc. without specifying which files and memoranda are sought * * *." On June 27, 1957, Chief Judge Robert A. Inch granted the motion to quash (R. 74), "without prejudice to the Government's legal rights as to the * * * tax liability" of the petitioner. The Court of Appeals reversed, with a direction to deny the motion to quash and to enforce the summons. (Pet. 21; R. 79.)

ARGUMENT

1. In holding that the taxpayer was required to produce certain specifically designated categories of business records for the Internal Revenue Service's inspection in connection with its investigation of the taxpayer's liability for the four-year period to which the requested material related, the decision below correctly enforces the investigative authority conferred by Section 7602 of the Internal Revenue Code of 1954, *supra*, pp. 3-4. Section 7602 in effect provides that in order to ascertain the correctness of any return and to determine tax liability, the Secretary or his delegate is authorized to require any person to give such testimony and to produce such data as may be relevant or material to the inquiry. The right to investigate—a corollary of the duty imposed upon the Treasury Department by Section 7601(a) of the Internal Revenue Code of 1954, *supra*, p. 3—has been broadly construed. *Falsone* v. *United States*, 205 F. 2d 734, 742 (C.A. 5th), certiorari denied, 346 U.S. 864; cf. *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322. The only statutory restrictions upon that right are that no taxpayer shall be subjected to "unnecessary examination or investigations," and that except upon a taxpayer's request or upon written notice by the Secretary, "only one inspection of a taxpayer's books of account shall be made for each taxable year". Section 7605(b) of the Internal Revenue Code of 1954, *supra*, pp. 5-6.

The taxpayer did not contend below, nor does it now contend, that the books and records sought to be inspected are irrelevant or immaterial to the investigation of its liability. It does assert, however (Pet. 7-10), that as a matter of law the pendency of the Tax Court proceeding covering its liability for 1953 forecloses any further investigation as to that year by the Internal

Revenue Service; and that in any event (Pet. 11-12) further inspection of its 1953 records would constitute an unnecessary examination, and a second inspection, within the meaning of Section 7605(b).[2] Both contentions are without merit. As to the pendency of the Tax Court proceeding, concededly the Secretary or his delegate had no right to determine any additional deficiency for 1953 after the petition covering that year had been filed with the Tax Court. But, as the lower court correctly observed (Pet. 20), the Tax Court possessed the statutory power "to assess a deficiency greater than that originally determined by the Commissioner" (Section 272(e) of the Internal Revenue Code of 1939, *supra*, p. 2), and nothing in Section 272(e) "purports to restrict the subpoena power of the 'Secretary or his delegate' ", under the summons provisions of the 1954 Code, "to support the Commissioner's position *in the Tax Court*". (Emphasis supplied.) See also, *Bolich* v. *Rubel*, 67 F. 2d 894 (C.A. 2d); *Tax Liability of Norda Essential Oil & Chemical Co.*, 142 F. Supp. 868, 870-871 (S.D.N.Y.).

As to the alleged noncompliance with Section 7605(b), the record shows that one aspect of the prior inspection of the 1953 records was in connection with the investigation of another, though related, corporation. And in so far as any examination was made in connection with the investigation of the taxpayer's liability, it was, as the lower court noted, a mere (Pet. 20-21) "cursory examination * * * [which] was not shown to have com-

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[2] In the court below, the taxpayer contended, in addition, that the mandatory production of its records for the fiscal year 1953 would constitute a violation of its constitutional right to freedom from unreasonable search and seizure, and that some of the records sought to be inspected for all years had not been sufficiently identified in the summons and were not germane to the inquiry. These contentions have now been abandoned.

pleted the investigation", and thus "did not constitute an 'inspection' within the meaning of * * * [the] statute."

2. There is no conflict of decisions. The taxpayer's contrary assertion (Pet. 10-11) rests entirely upon its unwarranted conclusion that in the proceeding to enforce the summons the Commissioner had alleged fraud in the 1953 return "without any showing of reasonable cause for such belief". The record does not support this conclusion. On the contrary, the affidavit of Agent Murray L. Waldman set forth several specific (R. 66-67) " reasonable grounds to suspect and probable cause to believe that the Taxpayer has committed fraud". In any event, no issue as to the extent of the allegations of fraud prerequisite to enforcement of the summons was raised below, nor did the court below purport to lay down any governing rule in that respect. Taxpayer's assertion of conflict on this score (Pet. 11) is addressed to a straw issue.

CONCLUSION

The decision of the court below is correct, there are no conflicting decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 139

NATIONAL PLATE AND WINDOW GLASS COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

NATIONAL PLATE AND WINDOW GLASS COMPANY, INC., *Petitioner*, v. UNITED STATES OF AMERICA, *Respondent*.	No. 139

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1. Respondent's brief does not dispute petitioner's contention that upon the filing of a petition in the Tax Court of the United States to redetermine a deficiency by the Commissioner that:

(a) The Tax Court has exclusive jurisdiction to determine the tax (Section 7442 and 6214(a) of the Internal Revenue Code of 1954).

(b) specific power in aid of such exclusive jurisdiction exists in the Tax Court under Section 7456 and is reflected in Tax Court Rules 44 and 45, regulating the issuance of subpoenas for books and records and the taking of testimony.

(c) The Chief Counsel of the Internal Revenue Service and his delegates are the only authorized persons to appear in a Tax Court proceeding on behalf

of the Commissioner of Internal Revenue and not a Special Agent. Indeed, respondent specifically states "concededly the Secretary or his delegate had no right to determine any additional deficiency for 1953 after the petition covering that year had been filed with the Tax Court." (R. B. 12) Obviously this concession removes the very purpose for the application of Section 7602 of the Internal Revenue Code of 1954, since the purpose of that general section is to enable the Commissioner to determine the tax and issue the deficiency notice based thereon. Equally obvious is that the express statutory power given to *only* the Chief Counsel and his delegate to represent the Commissioner of Internal Revenue in the Tax Court prohibits the Special Agent from issuing process under Section 7602 of the Internal Revenue Code of 1954 in aid of a Tax Court proceeding.

2. The absence of an express provision in Section 6212(c) of the Internal Revenue Code of 1954 limiting the application of Section 7602 of the Internal Revenue Code of 1954 when a Tax Court proceeding exists as to a given year cannot defeat the evident purpose of Section 6212(c) to provide the Tax Court with the power to control all phases of the tax litigation, otherwise Section 6212(c) and the other provisions giving the Tax Court exclusive jurisdiction are rendered ineffective and inconsistent with Section 7602 of the Internal Revenue Code of 1954 under the interpretation of the U. S. Court of Appeals for the Second Circuit.

Under these circumstances Section 6212(c) which is a specific enactment dealing with cases docketed before the Tax Court must prevail and limit the application of the general provisions of Section 7602 of the Internal Revenue

(R. B.) Respondent's Brief.

Code of 1954 when the application of Section 7602 would be in conflict with and in derogation of the provisions contained in Section 6212(c). See *MacEvoy* v. *United States*, 322 U. S. 102, 107; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *United States* v. *Chase*, 135 U. S. 255, 260-261.

3. By limiting the issue in this case to the petitioner's fiscal year ended in 1953, respondent admits that the petitioner was correct when it maintained that the records for the years 1954 to 1956 had been examined and the records for the year 1953 were not necessary to determine the tax for those other years. (see Petition for Rehearing below, R. 76, 77, 78). Indeed, as further pointed out in the Court below, the Commissioner had already issued a statutory notice of deficiency based upon such examination for the fiscal year 1954 in which no fraud was alleged (Petition for Rehearing in Court below, R. 77, 78). In this respect the Court below was incorrect in its statement that the 1953 records were needed for subsequent years and in its citation of *Norda Essential Oil & Chemical Co.* v. *United States*, (C. A.-2) 230 F(2d) 764, as applicable.

4. Respondent, in a footnote to his brief (R. B. 12) alleges that the petitioner has abandoned the contention "that the mandatory production of its records for the fiscal year 1953 would constitute a violation of its constitutional right of freedom from unreasonable search and seizure." This belief of the respondent is probably due to oversight for in the very petition for a writ of certiorari in this proceeding Question 1(a) specifically poses the constitutional question. (P. B. 2).

5. Respondent errs when he states, under Argument 2 (R. B. 13) that (a) Special Agent Waldman's affidavit is

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(R.) Record.
(P. B.) Petitioner's Brief.

sufficient showing of the probability of fraud, and (b) the petitioner did not raise in the Court below the question to what extent belief of fraud must be shown.

With regard to (a) above, Waldman's affidavit is a self-serving administrative statement without any indicia for an Appellate Court to over-rule a trial court's finding to the contrary.

With respect to (b) above, the petitioner submits the issue was raised both orally and upon brief in the U. S. District Court for the Eastern District of New York as well as in the Court below and is also contained in the petition for rehearing before the Court below (R. 78, 79). The Record also discloses that the degree of "fraud", if any, had been raised in the motion to quash (R. 53, 56).

6. Respondent in his recital of the facts attempts to create the impression that petitioner permitted a "cursory examination" of its 1953 records subsequent to the filing of a petition in the Tax Court of the United States and thereafter refused a second inspection of the records under 7605(b) of the Internal Revenue Code of 1954. Petitioner contended below that no direct examination of its 1953 books was ever made but that the inspection referred to by respondent as having occurred on February 28, 1957 pertained only to the 1954 to 1956 records. At no time after the filing of the petition in the Tax Court of the United States on February 7, 1957 did the petitioner allow an inspection of its 1953 records for the purpose of determining its tax liability for that year. Petitioner took the position, after the Internal Revenue Service refused to make a timely examination (R. 58) and thereafter issued a sham, frivolous and arbitrary statutory notice of deficiency in an attempt to toll the statute of limitations (R. 62-64), that the Tax Court of the United States had exclusive jurisdiction and therefore the Commissioner's summons issued by a Special

Agent when the case was already at issue in the Tax Court of the United States was illegal.

7. Respondent misinterpreted petitioner's reliance on Section 7605(b) of the Internal Revenue Code of 1954 as limiting the application of Section 7602, assuming that 7602 had not already been made inapplicable by Section 6212(c) under the facts of this case. Petitioner's contention is not based upon a mere cursory examination of one account in connection with a third party checkup, but upon the fact that the statutory notice of deficiency was a frivolous, sham, and arbitrary act of the Commissioner to evade the limitations provided in Section 6501(a) of the Internal Revenue Code of 1954; or alternatively, the use of the petitioner's accountant's work sheets, as well as data obtained from other sources, constitute a sufficient initial examination to require a Commissioner's letter as provided by Section 7605(b). Petitioner's contention on this point is set forth in further detail under Point 5 in the petition for a writ of certiorari.

Conclusion

For the reasons hereinbefore stated; petitioner's petition for a writ of certiorari should be granted.

Respectfully,

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In the United States Court of Appeals for the Second Circuit

No. —

In the Matter

of

NATIONAL PLATE & WINDOW GLASS CO., INC.

To quash a Commissioner of Internal Revenue Summons Duces Tecum

UNITED STATES OF AMERICA, APPELLANT

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT AND APPENDIX

OPINION BELOW

The memorandum opinion of the District Court (Appendix, *infra*) is not reported.

JURISDICTION

This is an appeal from an order of the District Court, entered on June 27, 1957, granting a motion to quash a summons duces tecum issued by the Commissioner of Internal Revenue. (Appendix, *infra.*) The case is brought to this Court by a notice of appeal filed on

August 23, 1957. (Appendix, *infra.*) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the taxpayer's filing of a petition in the Tax Court, opposing the Commissioner's determination with respect to the fiscal year 1953 and praying for a redetermination of its liability as to that period, foreclosed the Commissioner from making an investigation of the taxpayer's liability pursuant to Section 7602 of the Internal Revenue Code of 1954.

2. Whether the fact that a cursory inspection of the taxpayer's books and records for the fiscal year 1953 had been made prior to the issuance of a summons for their production barred further examination as unnecessary, and as a second inspection, within the meaning of Section 7605(b) of the Internal Revenue Code of 1954.

3. Whether mandatory production of the taxpayer's records for the fiscal year 1953, pursuant to the summons issued, violated the taxpayer's constitutional right to freedom from unreasonable search and seizure.

4. Whether the records sought to be produced by the summons for all years were sufficiently identified, and were germane to the inquiry.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in

equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7602.)

SEC. 7603. SERVICE OF SUMMONS.

A summons issued under section 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or

other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7603.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to

the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7604.)

SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * * * *

(b) *Restrictions on Examination of Taxpayer.*— No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7605.)

STATEMENT

The District Court made no findings of fact. As stated in the affidavits filed in connection with the motion to quash (Appendix, *infra*), the facts pertinent to this appeal may be summarized as follows:

Prior to April 3, 1956, Revenue Agent Irving Uberall and Special Agent Murray L. Waldman, both of the Internal Revenue Service, had been engaged in an investigation of the tax liability of Samuel Kirschner and Sons, Inc., a corporation closely allied to National Plate and Window Glass Company, Inc., hereafter referred to as the taxpayer. Both corporations had virtually the same stockholders. Herbert Kirshner and Alvin Kirshner, who were under investigation by Special Agent Waldman in their individual capacities,

were the principal stockholders in both corporations. The taxpayer, a middleman, purchased glass from factories, and distributed it to its own purchasers. Samuel Kirschner and Sons, Inc., a contractor, bought glass from the taxpayer.

The investigation of Samuel Kirschner and Sons, Inc., revealed that it and the taxpayer had engaged in some highly questionable transactions. On April 3, 1956, Special Agent Waldman, in order to substantiate the records of Samuel Kirschner and Sons, Inc., obtained from Mr. Jack Klein, the accountant for both corporations, certain worksheets relating to the taxpaper's fiscal year 1953.[1] These worksheets, used as an aid in preparing the taxpayer's return for the fiscal year 1953, showed that there were some income transactions which were not reflected in the taxpayer's reported gross income, and that inventory figures may possibly have been juggled so as to report a lesser amount of gross profits.

On June 7, 1956, Special Agent James A. Duffy was assigned to investigate the taxpayer's liabilities. He was in charge of the investigation, working in cooperation with Special Agent Waldman and Internal Revenue Agent Uberall.

On October 19, 1956, with the statute of limitations about to run on the taxpayer's liability for the fiscal year 1953, Revenue Agent Uberall requested the taxpayer to execute a Form 872 extending to June 30, 1958, the time within which an assessment could be made for the fiscal year 1953. By letter dated October

[1] On May 3, 1956, the United States District Court for the Southern District of New York denied the accountant's motion for return of the worksheets to his possession. No issue as to this matter is before this Court.

24, 1956, the taxpayer's attorney, Bernard Weiss, advised the District Director that the taxpayer desired the Internal Revenue Service to examine its books for the fiscal year 1953 prior to the expiration of the statute of limitations period. On November 14, 1956, one day before the expiration date, the Commissioner forwarded a 90-day deficiency notice to the taxpayer. Thereafter, the taxpayer filed a petition with the Tax Court contesting the proposed deficiency for the fiscal year 1953, and requesting redetedmination of its tax liability for that period.

On January 14, 1957, Special Agents Duffy and Waldman visited the taxpayer's premises, and photostated certain of the taxpayer's ledger accounts. This was done, however, in connection with the investigation of Samuel Kirschner and Sons, Inc. On February 28, 1957, the taxpayer was investigated for the first time with respect to its own liability when Special Agent Waldman made a cursory inspection of its books and records for the fiscal year 1953. This was done for the purpose of determining if the taxpayer had "made a fraudulent return" and whether there was "Civil Fraud" or "Criminal Fraud." On March 4, 1957, a third party was questioned with respect to the taxpayer's liability; the questioning revealed that a fraudulent transaction had occurred. Four days later, Special Agent Waldman visited the taxpayer's premises, but was denied the right to inspect documents for the fiscal year 1953. The taxpayer's agents had scotch taped the taxpayer's records for that period, making inspection impossible.

On May 22, 1957, Special Agent Duffy served upon the taxpayer's president a summons to testify on June 4, 1957, concerning the taxpayer's liabilities for the

fiscal years 1953 through 1956, and to produce the following books, records and papers of the taxpayer (Appendix, *infra*):

> Cash receipts journals, cash disbursements journals, general journals, general ledgers, petty cash books and vouchers, payroll books, purchase journals, sales journals, sales returns and allowances journals, accounts receivable ledgers, accounts payable ledgers, sales invoices, purchase invoices (paid bills), bank statements and cancelled checks, correspondence files, minute books, stock ledger or stock book, minute books, and any and all books, records and memoranda of the National Plate & Window Glass Company, Inc.

The period for complying with the summons with respect to the fiscal year 1953 was extended, by oral agreement, from June 4, 1957, to June 12, 1957.

On June 4, 1957, the taxpayer filed notice that it would move the United States District Court for the Eastern District of New York to quash the summons. With the notice of motion it submitted the affidavit of its president, Herbert Kirshner.

At the hearing on the motion, the affidavits of Special Agents James A. Duffy and Murray L. Waldman, and of Revenue Agent Irving Uberall were submitted on behalf of the United States. The affidavit of Special Agent Duffy showed that the summons was issued by him in the performance of his official duties; that the action taken had been authorized by his superiors in the Intelligence Division of the Internal Revenue Service; that the summons was not issued at the behest of, or for the benefit of, any other agency of the Gov-

ernment; and that in his opinion, the use of the summons in the investigation of the taxpayer's liability was "material and necessary for a proper determination of the tax liability of National Plate & Window Glass Company, Inc."

Special Agent Waldman's affidavit stated that there were "reasonable grounds to suspect and probable cause to believe that the Taxpayer has committed fraud." In reaching this conclusion, the affidavit stated that Special Agent Waldman relied upon (a) the close relationship between the taxpayer and Samuel Kirschner and Sons, Inc., and the fact that investigation of the latter corporation had "revealed some highly questionable transactions transpiring between" the two; (b) the fact that the work papers of the taxpayer's accountant for the fiscal year 1953 had revealed "specific business transactions of the Taxpayer which were not included in the Taxpayer's gross income" or in its return; (c) the fact that the same work papers revealed "a possible juggling of inventory figures so as to report a lesser amount of gross profits"; and (d) the fact that the taxpayer's gross sales for the period 1951-1955, inclusive, as shown in its returns, steadily increased, while its gross profits, as computed from the returns, markedly decreased.[2] According to the

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[2] The following table is included in Special Agent Waldman's affidavit (Appendix, *infra*):

	Gross Sales	Gross Profits
Partnership return—National Glass Co.—1951	$102,089.44	48.8%
National Plate and Window Glass Company, Inc.—9/18/51-8/31/52	413,426.08	19.9%
National Plate and Window Glass Company, Inc.—9/1/52-8/31/53	683,471.45	14.8%
National Plate and Window Glass Company, Inc.—9/1/53-8/31/54	992,264.05	10.6%
National Plate and Window Glass Company, Inc.—9/1/54-8/31/55	868,198.01	14.4%

affidavit the documents specified in the summons were "extremely important to the investigation"; without their production "further investigation of the civil and criminal fraud must be suspended"; they were "both material and relevant" to the investigation, since they were "necessary to reconstruct the financial history of the corporation, and to ascertain exactly what items were included or excluded in the Taxpayer's return which should not have been included or excluded." Further, according to the affidavit, the work papers of the taxpayer's accountant covering the fiscal year 1953, and the interrelationship of the stockholders of Samuel Kirschner and Sons, Inc., and of the taxpayer, indicated "an overpowering likelihood that some or all of the requested documents" would "bear heavily" upon determination of the taxpayer's possible "civil and/or criminal fraudulent liabilities."

Revenue Agent Uberall's affidavit stated that the materials requested by the summons (Appendix, *infra*)—

> are necessary in order to perform a fair and accurate audit of the taxpayer's returns for the fiscal years in question. The information needed and sought herein by the Internal Revenue Service is material and relevant to this investigation as there is every indication and an extremely strong likelihood that the aforementioned documents have an integral bearing on the tax liability of the taxpayer.

On June 12, 1957, the taxpayer moved to quash the summons in its entirety insofar as it applied to the fiscal year 1953; and, insofar as it applied to the remaining fiscal years 1954, 1955, and 1956, the taxpayer

(see notice of motion, Appendix, *infra*) requested the court to quash that part of the summons which "demands all correspondence files, and memoranda of the National Plate & Window Glass Co., Inc. without specifying which files and memoranda are sought * * *."

On June 27, 1957, Chief Judge Robert A. Inch granted the motion to quash, "without prejudice to the Government's legal rights as to the tax liability" of the petitioner. This appeal is from the order entered by the District Court.

STATEMENT OF POINTS TO BE URGED

The District Court erred in granting the motion to quash the summons issued by the Internal Revenue Service, in that:

1. The fact that the taxpayer had filed a petition in the Tax Court opposing the Commissioner's determination with respect to the fiscal year 1953 did not foreclose the Commissioner from making an investigation of the taxpayer's liability pursuant to Section 7602 of the Internal Revenue Code of 1954.

2. The fact that a cursory inspection of the taxpayer's books and records for the fiscal year 1953 had been made prior to the issuance of the summons for their production did not bar further examination as unnecessary, and as a second inspection, within the meaning of Section 7605(b) of the Internal Revenue Code of 1954.

3. Mandatory production of the taxpayer's records for the fiscal year 1953, pursuant to the summons issued, would not violate the taxpayer's constitutional right to freedom from unreasonable search and seizure.

4. The records sought to be produced by the summons for all of the fiscal years 1953 to 1956, inclusive, were

sufficiently identified, and were germane to the inquiry sought to be conducted.

SUMMARY OF ARGUMENT

1. The pendency of Tax Court proceedings with respect to the fiscal year 1953 does not foreclose continued investigation under the summons provisions. The Commissioner is charged with the duty of determining, assessing, and collecting the taxes imposed by the revenue laws. That duty persists even after the Commissioner has made a determination which is contested before the Tax Court. Since the Tax Court itself has jurisdiction to redetermine the correct amount of a deficiency, and even in a greater amount than that originally asserted by the Commissioner, the Commissioner may continue his investigation in order to support the determination of the possibly greater deficiency by the Tax Court. In this respect, as this Court has held, the Commissioner's function remains strictly inquisitorial; and he does not become a mere evidence gatherer for the Tax Court.

2. In the circumstances of this case, examination of the taxpayer's records for the fiscal year 1953, pursuant to the summons, is neither unnecessary, nor would it constitute a second inspection, within the meaning of Section 7605(b) of the 1954 Code. The affidavits filed below make it clear there had not been any statutory examination of the fiscal year 1953 records vis-a-vis the investigation of the taxpayer's own liability. The examination, at best, was cursory, and it was interrupted by the taxpayer's scotch-taping of records upon demand to produce them. Furthermore, even if it is assumed, *arguendo*, that the fiscal year 1953 records had been adequately examined (as they were

not) with respect to the investigation of the fiscal year 1953 liability, the investigation, as the summons made clear, touched subsequent years as well. The fiscal year 1953 records, accordingly, may well have been necessary in order to properly determine the taxpayer's liability for the subsequent years.

3. No violation of constitutional rights is here involved. The Fourth Amendment of the Constitution cannot be invoked, since the production of documents sought by the summons was not out of proportion to the end sought by the investigation. There was no oppressive conduct; no "fishing excursion" was being conducted. While it is true that the agents suspected fraud, and of a magnitude possibly sufficient to sustain a recommendation for criminal prosecution, the use of agents to ferret out such fraud violated no constitutional right of the taxpayer.

4. The records requested by the summons were sufficiently identified, and were germane to the inquiry sought to be conducted. The only items whose production was resisted below were the taxpayer's "correspondence files" and "memoranda." These are terms commonly used and understood in the business world, and the material requested was the taxpayer's, not that of a third party. Along with the other material requested in the summons, the correspondence files and memoranda were declared by the Government agents, in the affidavits submitted below, to be relevant and essential to a determination of corrected tax liability. Decisions of the appellate courts in summons cases, and of the Supreme Court in analogous cases, have upheld the enforcement of summons and subpoenas *duces tecum* upon a *general* showing that the documents

sought were relevant to the inquiry conducted, even where, as here, the documents were designated by broad classification.

5. In any event, even assuming *arguendo* that the summons was invoked as to the fiscal year 1953, it was unquestionably valid and should have been upheld as to the fiscal years 1954-1956, inclusive. With respect to the latter years, the motion to quash was addressed *solely* to that portion of the summons which requested production of the taxpayer's "correspondence files" and "memoranda," and not to those records which were specifically enumerated in the summons. Since the taxpayer did not oppose the summons in so far as it related to the fiscal years 1954-1956, inclusive, and demanded certain specified material, the District Court clearly erred in granting the motion *in toto*.

ARGUMENT

The District Court did not state why it granted the motion to quash the summons issued in the instant case. Accordingly, since the taxpayer advanced several grounds below in making its motion, they will be considered here as if the court had found them all meritorious.

I

The Filing of a Petition in the Tax Court Contesting the Commissioner's Determination as to the Fiscal Year 1953 Did Not Foreclose Continued Investigation of the Taxpayer's Liability for That Period

One of the taxpayer's contentions was that since it had filed a petition in the Tax Court contesting the Commissioner's determination for the fiscal year 1953, further investigation as to its liability for that year by

agents of the Internal Revenue Service was automatically barred. The rationale presumably is that since the Commissioner had made a determination of the tax liability for the fiscal year 1953 and the taxpayer had placed the issue before the Tax Court by the filing of a petition, the Tax Court acquired sole and exclusive jurisdiction to determine correct tax liability, and accordingly, the Commissioner had no authority to perform any act in respect of such liability. The taxpayer's position, we submit, rests upon the erroneous assumption that in making the determination of tax liability for the fiscal year 1953, the Commissioner in effect acted as a *tribunal,* and that the appeal to the Tax Court from his determination terminated his duties or functions and all authority with respect to ascertaining the correct amount of the tax to be assessed and collected. But the Commissioner is not a tribunal; nor is there any analogy between his acts in the discharge of his official duties and the decisions of a tribunal vested with jurisdiction to hear and determine cases or controverted issues between contesting parties. The Commissioner is an administrative officer of the United States, charged with the duty of determining, assessing and collecting the taxes imposed by the revenue laws. In discharging that duty he acts for and on behalf of the United States. His acts are purely administrative, not judicial, in character. It is true, of course, that if the Commissioner determines a deficiency in income tax against a taxpayer for any year, the taxpayer may petition the Tax Court for a redetermination, and the Commissioner cannot proceed with the assessment and collection of the additional tax until after the final decision of the Tax Court (Section 6213(a) of the In-

ternal Revenue Code of 1954).[3] And it is true, too, that after a petition is filed with the Tax Court for redetermination of a deficiency for any year, the Commissioner may not determine an additional deficiency for the same year, except in case of fraud, mathematical errors, and in cases of jeopardy (Section 6212(c)(1) of the Internal Revenue Code of 1954).[4] *Never-*

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[3] Section 6213(a) provides:

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days * * * after the notice of deficiency * * * is mailed * * * the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6213(a)).

For taxes imposed under the 1939 Code, see the substantially identical provisions of Section 272(a) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 272(a)).

[4] Section 6212(a)(1) provides:

SEC. 6212. NOTICE OF DEFICIENCY.

* * * * * *

(c) *Further Deficiency Letters Restricted.*—

(1) *General Rule.*—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year * * * *except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213*

theless, upon the filing of a petition the Tax Court is given jurisdiction to redetermine the correct amount of the deficiency, and even in a greater amount than asserted, if due claim therefor is made by the Commissioner (Section 6214(a), Internal Revenue Code of 1954).[5] Because of this fact, the right of a taxpayer to petition the Tax Court for redetermination of a deficiency asserted by the Commissioner, the jurisdiction conferred on the Tax Court to redetermine the correct amount of the deficiency, and the prohibition against the Commissioner's determination of an additional deficiency for the same year before the Tax Court are not in anywise inconsistent with the Commissioner's authority and power to make such examinations and reexaminations *as may be necessary to ascertain the correct tax liability of the taxpayer for the same year under review by the Tax Court.* Nothing in the Code

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(b)(1) (relating to mathematical errors), or in section 6861 (c) (relating to the making of jeopardy assessments). (Emphasis supplied.)

(26 U.S.C. 1952 ed., Supp. II, Sec. 6212(c)(1))

For taxes imposed under the 1939 Code, see Section 272(f) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 272(f)).

[5] Section 6214(a) provides:

SEC. 6214. DETERMINATIONS BY TAX COURT.

(a) *Jurisdiction as to Increase of Deficiency, Additional Amounts, or Additions to the Tax.*—The Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or addition to the tax should be assessed, if claim therefor is asserted by the Secretary or his delegate at or before the hearing or a rehearing.

(26 U.S.C. 1952 ed., Supp. II, Sec. 6214(a))

For taxes imposed under the 1939 Code, see Section 272(e) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 272(e)).

denies that authority and power to the Commissioner. On the contrary, it is the Commissioner's duty to assess and collect the tax finally determined to be due, and he is not relieved of that duty merely because he has determined a deficiency from which an appeal has been taken to the Tax Court. To discharge that duty he must, when necessary, reexamine the returns and all relevant records, and ascertain the correct amount of the tax. If, upon such reexamination, it appears that the deficiency which he previously determined is less than the correct amount, it is his duty to make a claim for the additional amount *so that the Tax Court may finally redetermine the correct deficiency.* The Commissioner's right to claim an additional deficiency and the jurisdiction conferred on the Tax Court to redetermine the correct amount necessarily contemplate that the Commissioner has authority to make such investigation and reexamination as may be necessary to enable him to assert the additional amount. A contrary conclusion would mean that the Commissioner is given the right to claim an addition to the deficiency previously determined and is charged with the duty of assessing and collect the correct amount of tax finally determined to be due, without the correlative authority of securing the information from which alone he can verify his previous computations and ascertain what, if any, additional amount is due. The provisions of the Internal Revenue Code should not be construed to produce such a contradictory result."

" Section 6214(b) of the Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Supp. II, Sec. 6214(b)) makes it mandatory that the Tax Court, in redetermining a deficiency of income tax for any year "consider such facts with relation to the taxes for other years as may be necessary correctly to redetermine the amount of such

As further evidence that the Commissioner's authority to examine and reexamine the taxpayer's books and records for the purpose of ascertaining the correct tax liability for any year is in nowise terminated or restricted by an appeal to the Tax Court, it should be noted that the 1954 Code authorizes the Commissioner to make an additional deficiency "in the case of fraud" and where the facts may warrant the making of a jeopardy assessment (Section 6212(c) of the 1954 Code). While no jeopardy assessment was sought to be made in the instant case, the record below clearly shows that, in the opinion of the agents, the taxpayer had probably committed fraud. Special Agent Waldman's affidavit stated that there were "reasonable grounds to suspect and probable cause to believe that the Taxpayer has committed fraud", that some of the information already available indicated "an overpowering likelihood that some or all of the requested documents" would "bear heavily" upon determination of the taxpayer's possible "civil and/or criminal fraudulent liabilities", and that unless the records sought by the summons were produced, "further investigation of the civil and criminal fraud must be suspended". (Appendix, *infra*.) In any event, even if this case did not involve the issue of possible fraud, the fact that the Commissioner is required to make an assesment where fraud or a jeopardy situation is indicated, in an amount greater than previously determined to be due,

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deficiency * * *". Nothing in the record of this case forecloses the *possibility* that facts concerning the fiscal year 1953 might aid in the determination of the taxpayer's liability for subsequent years. If, for example, corrected liability for the subsequent years was established on a net worth basis, assets and liabilities as to the fiscal year 1953 might, of course, be relevant in establishing a firm starting point.

and notwithstanding the pendency of an appeal before the Tax Court for the same year, shows that the 1954 Code sections providing for appeal to the Tax Court may not be construed as in anywise limiting the authority of the Commissioner to make such examinations and reexaminations of a taxpayer's books and records as may be necessary to ascertain and assert the correct tax liability for any year open to assessment.[7]

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[7] In the notice of motion filed below, the taxpayer alleged (Appendix, *infra*):

> (f) The Commissioner of Internal Revenue in sending out its 90-day Deficiency Notice and in its answer to petitioner's Petition before the Tax Court of the United States not having asserted any fraudulent acts of petitioner or alleged fraud, the Intelligence Unit, on information and belief, is without legal authority to require any testimony or records to be produced for said fiscal year ended August 31, 1953 for the purpose of determining petitioner's tax liability.

This allegation raises the collateral question whether the affidavits filed below on behalf of the Government indicated a sufficient basis to investigate with respect to possible fraud. Clearly, they did. See, in this connection, paragraphs 8(a), (b), (c) and (d) of Special Agent Waldman's affidavit (Appendix, *infra*), setting forth specific reasons constituting "reasonable grounds to suspect and probable cause to believe that the Taxpayer has committed fraud." Summarized, they are (1) that investigation of the closely related Kirschner corporation "has revealed some highly questionable transactions transpiring between the Taxpayer and Samuel Kirschner and Sons, Inc."; (2) that inspection of the accountant's work sheets revealed that "specific business transactions * * * were not included in Taxpayer's gross income", and also that there may have been "a possible juggling of inventory figures"; and (3) that a comparison of reported gross sales and gross profits from 1951 to August 31, 1955, showed that although gross sales "steadily increased, * * * gross profits have markedly decreased." We submit that this enumeration of facts showed reasonable grounds for a suspicion of fraud, and thus supported the issuance of the summons. *Peoples Deposit Bank & Trust Co.* v. *United States*, 212 F. 2d 87 (C.A. 6th), affirming, for the reasons stated therein, 112 F. Supp. 720 (E.D. Ky.); *Globe Construction Co.* v. *Humphrey*, 229 F. 2d 148 (C.A. 5th); *Zimmerman* v. *Wilson*, 105 F. 2d 583 (C.A. 2d); *In re Andrews' Tax*

This Court has so held, in *Bolich v. Rubel*, 67 F. 2d 894 (C.A. 2d). See also, *Tax Liability of Norda Essential Oil & Chemical Co.*, 142 F. Supp. 868, 870-871 (S.D.N.Y.). In the *Rubel* case corporate returns covering a four-year period had been filed, the Commissioner had determined deficiencies as to all years, had issued 60-day letters, and the taxpayer-corporations had filed petitions with the Board of Tax Appeals (now the Tax Court). While the Board proceedings were pending, the Commissioner, pursuant to statutory requirement, had sent a letter to the corporations requesting submission of books and records for a second examination.[8] Upon the failure to comply with this request, the Commissioner issued a summons to the president of the corporations, directing him to appear with the corporations' records, and subsequently obtained a court order to enforce that request. The president moved to vacate the order, alleging—substantially as the taxpayer in the instant case did below—that (p.

Liability, 18 F. Supp. 804 (Md.); *In re Wood*, 123 F. Supp. 297 (W.D. Ky.); *Schulman* v. *Dunlap*, 105 F. Supp. 104 (S.D. N.Y.); *In re Paramount-Jewelry Co.*, 80 F. Supp. 375 (S.D. N.Y.); *United States* v. *United Distillers Products Corp.*, 156 F. 2d 872 (C.A. 2d). As stated recently in *Corbin Deposit Bank of Corbin* v. *United States*, 244 F. 2d 177 (C.A. 6th), to require more here to show reasonable ground for suspicion and to support the issuance of the summons would be in effect to claim (p. 178)—

> that before the * * * Internal Revenue [Service] can conduct an investigation the issue of whether fraud has in fact been committed must first be litigated. Such a requirement would virtually nullify the investigative powers enumerated in §§ 7601 through 7607 of the Internal Revenue Code of 1954 * * *.

[8] As we shall observe more fully below, no written notification of a second examination was required in the instant case, since no "unnecessary" or second examination was being undertaken, within the meaning of Section 7605(b) of the Internal Revenue Code of 1954, *supra*.

894) "pending the appeals, the Board of Tax Appeals alone had jurisdiction over the controversy and its incidents." Recognizing that the Commissioner could not determine any additional deficiency for any year pending before the Board, this Court nevertheless correctly pointed out that, upon the Commissioner's demand, the Board itself could—as the Tax Court now can—increase the deficiency which the Commissioner had previously determined. See also, *Commissioner* v. *Wilson*, 60 F. 2d 501, 504 (C.A. 10th). Consequently, since the Commissioner could apply for an increase of assessment, this Court observed that (p. 895) "he may need to prepare his case in advance by a further examination." Addressing itself to the objection that to permit the Commissioner to investigate while a case as to the year under investigation is before the tax tribunal would, in effect, make the Commissioner an evidence gatherer for the tribunal—an argument also advanced below in the instant case [9]—this Court stated that the Commissioner's need for further examination in order to support his possible demand for an increase in assessment *by the tax tribunal* "is quite another matter from producing evidenced in support of it", and for that purpose his power of continued investigation during an appeal from his determination is not—

> a power to procure or perpetuate evidence at all; it is *strictly inquisitorial*, justifiable because all the facts are in the taxpayer's hands. (Emphasis supplied.)

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[9] Paragraph 3(c) of the notice of motion states, in effect, that since the Rules of the Tax Court make no provision for discovery proceedings, "the Commissioner * * * seeks to avoid the Rules * * * by the illegal use of the * * * summons in aid of its defense * * * before the actual trial of the action." (Appendix, *infra*.)

See also, *Application of Carroll*, 149 F. Supp. 634, 636 (S.D.N.Y.), affirmed, 246 F. 2d 762 (C.A. 2d), certiorari denied, 355 U.S. 857; *In re Albert Lindley Lee Memorial Hospital*, 209 F 2d 122, 123 (C.A. 2d); *In re Wood*, 123 F. Supp. 297, 302 (W.D. Ky.); *Torras* v. *Stradley*, 103 F. Supp. 737, 739 (N.D. Ga.).

Further, as to the possible abuse of such a power by the Commissioner, this Court observed in the *Rubel* case, in language equally applicable here (p. 895):

> No doubt the power may be abused, but the taxpayer is to some extent protected by the fact [1] that the Commissioner must demand the second examination in person * * * and [2] because the [district] court, before applying any sanctions * * * would probably have power to prevent *plain oppression*. (Emphasis supplied.)

As to the first of the above indicated protections against possible abuse by the Commissioner, we have already noted our intention to demonstrate below that in the circumstances of the instant case the demand for the production of the taxpayer's records covering the fiscal year 1953 did not constitute an "unnecessary" or second, inspection, within the meaning of Section 7605(b) of the 1954 Code, so as to require notification to the taxpayer of any additional examination of the records for that year. As to the second protection suggested by this Court, we submit that the record in this case is devoid of any "plain oppression" by the Commissioner which would justify the barring of the continued investigation as to the fiscal year 1953. The undisputed facts are that no investigation of the *taxpayer's* liability had been commenced prior to June 7,

1956, the date of Special Agent Duffy's assignment for that purpose. Prior thereto, an investigation of the tax liability of Samuel Kirschner & Sons, Inc., had been undertaken, and in connection with that investigation some questionable transactions between that corporation and the taxpayer were revealed. Also, examination of certain work sheets of the common accountant for both corporations—checked only with respect to the Kirschner corporation's liability, however—indicated that the taxpayer may not have correctly reported gross income for the fiscal year 1953, and that inventory figures may have been juggled. But it was not until February 28, 1957, that any of the taxpayer's records were checked in connection with the investigation of *its* liability, and that inspection was, as Special Agent Waldman described it, "cursory". (Appendix, *infra.*) On October 19, 1956, with the statute of limitations about to run on the taxpayer's liability for the fiscal year 1953, Revenue Agent Uberall requested the taxpayer to execute a Form 872, so as to extend to June 30, 1958, the time within which an assessment could be made with respect to the fiscal year 1953. On October 24, 1956, the taxpayer advised that it would not comply with the request. On November 14, 1956, one day before the running of the statute of limitations, the Commissioner issued a 90-day notice, and the taxpayer thereafter filed a petition in the Tax Court. No intimation of *oppressive* conduct with respect to the investigation of the taxpayer's liability for the fiscal year 1953 can be gleaned from these facts. There had been only a "cursory" check, as Special Agent Waldman stated under oath; and nothing in the affidavit of Herbert Kirshner, the only affidavit submitted below on the taxpayer's behalf, even attempts

to controvert that characterization. Given the taxpayer's refusal (albeit permissible under the law) to cooperate by executing the Form 872, the Commissioner was left with no alternative but to continue the investigation for the year in question. To deny him that right in the circumstances of this case, with no showing below that the Commissioner had procrastinated in the investigation of the taxpayer's liability, would indeed reward, to the detriment of the revenue, the taxpayer's skill in concealing its true possible liability.

II

Examination of the Taxpayer's Books and Records for the Fiscal Year 1953, Pursuant to the Summons Issued, Would Not Constitute an "Unnecessary", or Second, Inspection, Within the Meaning of Section 7605(b) of the 1954 Code

Section 7605(b) of the Internal Revenue Code of 1954, *supra*, provides that:

> No taxpayer shall be subjected to *unnecessary* examination or investigations, and only *one inspection* of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary. (Emphasis supplied.)

The restrictions upon the examination of a taxpayer imposed by this Code provision are clearly not applicable here, since there never was an "examination" or a "one inspection" of the taxpayer's fiscal year 1953 records, within the meaning of Section 7605(b). As we have noted above, the investigation of the taxpayer's liability (to be distinguished from the inves-

tigation of liability of the Kirschner corporation or of the individual Kirshners) apparently began with the June 7, 1956 assignment of Special Agent James A. Duffy to the case. However, not until February 28, 1957, were any of the taxpayer's books and records inspected *in connection with its own liability,* and that "inspection" was a "cursory" one. (Appendix, *infra.*) Prior to that time, Special Agent Waldman had on April 3, 1956, obtained certain accountant's work sheets for the fiscal year 1953, pertaining to the taxpayer, but that was done only "for the purpose of substantiating records of Samuel Kirschner and Sons, Inc." (Appendix, *infra*); and on January 14, 1957, certain of the taxpayer's ledger accounts were photostated, but that action, too, as Special Agent Waldman stated under oath, was taken "in the course of my investigation of Samuel Kirschner and Sons, Inc." (Appendix, *infra.*).

In these circumstances, it would be most unrealistic to consider that the "cursory" inspection of the taxpayer's books in connection with the investigation of its own liability for the fiscal year 1953 constituted such an examination or investigation as to make further inspection, in the statutory sense, either "unnecessary", or in fact a *second* inspection of the taxpayer's books of account for that period. Significantly, the taxpayer itself appears to have undermined any possible contention that inspection of the 1953 records pursuant to the summons, would constitute a *second* inspection; paragraph 5(d) of its petition filed in the Tax Court alleges (Appendix, *infra*):

> The Commissioner of Internal Revenue *made no examination of taxpayer's records for the period*

> *herein involved* but arbitrarily has disallowed the deductions claimed on taxpayer's income tax return for the fiscal year ended August 31, 1953 * * *.[10] (Emphasis supplied.)

Furthermore, on the hypothesis that an inspection of the taxpayer's records in connection with its own liability had been begun on February 28, 1957, the date of Special Agent Waldman's visit, the undisputed fact, as indicated in Special Agent Waldman's affidavit, is that it was not completed, *but was interrupted by the taxpayer itself.* Mr. Waldman stated, in effect, that within ten days after the February 28, 1957, visit (and four days after the questioning of a third party as to the taxpayer's liability) he (Waldman) "visited the National Plate and Window Glass Company, Inc., but was denied the right to inspect documents for the fiscal year ending August, 1953, because *agents of the Taxpayer Scotch-taped the 1953 records, thereby making it impossible to perform any investigation for that period.*" (Emphasis supplied.) (Appendix, *infra.*) In this situation, it seems clear that the examination commenced on February 28, 1957 "had never terminated", and that consequently, "there is no question before this court of any 're-exan ination' [or *second* inspection] made by the Government of the taxpayer's records." *Boren* v. *Tucker,* 239 F. 2d 767, 771 (C.A. 9th).

Whether the desired examination of the taxpayer's records was necessary—or "unnecessary" in the statutory sense, as the taxpayer claims—must turn upon

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[10] The taxpayer's president stated in the affidavit affixed to the petition that he had (Appendix, *infra*)—

> read the foregoing petition and is familiar with the statements contained therein and the facts stated are true.

the facts developed below. The affidavit of the taxpayer's president submitted with the motion to quash does not even address itself to that matter; by contrast, the affidavits submitted on the Government's behalf are quite explicit. Special Agent Waldman's affidavit, in addition to asserting he had not "completed * * * [his] report in regard to the Taxpayer, but, in fact, * * * [had] made only one cursory inspection of the Taxpayer's books and records dealing with the fiscal year * * * 1953", all other inspections having been "made in conjunction with investigating other taxpayer's", alleged (Appendix, *infra*):

> The documents specified in the subpoena are extremely important to the investigation of the Taxpayer in that without production of these books, records, etc further investigation of the civil and criminal fraud must be suspended. The documents specified in the summons duces tecum are * * * necessary to reconstruct the financial history of the corporation, and to ascertain exactly what items were included or excluded in the Taxpayer's return which should not have been included or excluded.

Internal Revenue Agent Uberall's affidavit (Appendix, *infra*), alleging that pertinent material had been "withheld" and had "never been made available" for his "inspection or investigation", stated that the items specified in the summons were "necessary in order to perform a fair and accurate audit of the taxpayer's returns for the fiscal years in question". Special Agent James A. Duffy's affidavit (Appendix, *infra*) stated that the summons issued for inspection of the

taxpayer's records was "material and necessary for a proper determination of the tax liability of National Plate & Window Glass Company, Inc." The language of a statute is to be read in its natural and common meaning (*Welch* v. *Helvering*, 290 U.S. 111; *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552, 560), and words or terms are to be given ordinary meaning. (*Crane* v. *Commissioner*, 331 U.S. 1; *Irrgang* v. *Fahs*, 94 F. Supp. 206 (S.D. Fla.)). To construe the language of Section 7605(b) of the 1954 Code—"unnecessary examination or investigations"—as foreclosing inspection of the fiscal year 1953 records in the circumstances of this case would be, we submit, a patent distortion of the term "unnecessary". In determining whether a given examination of records is "unnecessary" within the meaning of the statute, "Every presumption is to be made in support of the Commissioner's action"; necessity "is to be judged with * * * [the] powers and purposes [of the Commissioner] in mind", i.e., the Commissioner's right to make an examination for the purpose of ascertaining the correctness of any return, or for the purpose of making a return where none has been filed. *Pacific Mills* v. *Kenefick*, 99 F. 2d 188, 189 (C.A. 1st). Thus, in *In re Paramount Jewelry Co.*, 80 F. Supp. 375, 376 (S.D. N.Y.), the court held that although the taxpayer's books had been examined "three or four times during the past two years", the continuance of the investigation under summons procedure "should not be halted by the court" where, in a proceeding substantially the same as that below in the instant case, the affidavits of the Government agents demonstrated a probable concealment of income, and "*assert*[*ed*] *that their investigation and audit* has not

been completed."[11] (Emphasis supplied.) *A fortiori*, an investigation should be continued where, as in the instant case, the examination and inspection of records was partial and fragmentary, covered only a relatively short period of time, and where there has been no showing that the agents had not been sufficiently alert or had procrastinated. The summons provisions of the Internal Revenue Code were intended as a practical implementation of the right to inquire into the liabilities of taxpayers. *Globe Construction Co.* v. *Humphrey*, 229 F. 2d 148 (C.A. 5th); *Zimmerman* v. *Wilson*, 105 F. 2d 583 (C.A. 2d); *United States* v. *United Distillers Products Corp.*, 156 F. 2d 872 (C.A. 2d). The order below, in effect reflecting a determination that there had been a meaningful examination or investigation of the taxpayer's liability as to the fiscal year 1953, and that further examination under the summons would constitute an unnecessary and second inspection, has given the provisions of Section 7605(b) an unrealistic and impractical interpretation, negativing the investigatory powers given the Commissioner under the Code.

There is an additional reason why inspection of the fiscal year 1953 records is not subject to the restrictions imposed by Section 7605(b). Even if it is assumed, *arguendo*, that there had been an examination, investigation or inspection of records, in the statutory sense, the agents' activities had been concerned with the taxpayer's liability for the fiscal year 1953. The sum-

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[11] In the *Paramount Jewelry* case, the court required the Commissioner to notify the taxpayer in writing that an additional inspection was necessary, presumably because the books and records had apparently been thoroughly examined over a period of two years. See also *In re Wood*, 130 F. Supp. 121, 124 (W.D. Ky.).

mons, however, requests the production of records covering the period "Fiscal years ended August 31, 1953 *to 1956 inclusive.*" (Emphasis supplied.) (Appendix, *infra.*) Section 7605(b) provides that "only one inspection of a taxpayer's books of accounts shall be made for *each taxable year*" unless statutory notification is given by the Secretary or his delegate. (Emphasis supplied.) It does not purport to prohibit a re-inspection of records in connection with the investigation of tax liability for years not previously examined. "Each taxable year is a unit which must be separately examined and determined." *Norda Essential Oil & Chemical Co.* v. *United States*, 230 F. 2d 764, 765 (C.A. 2d), certiorari denied, 351 U.S. 964. In that case, the summons issued sought 1950 and 1951 records of the taxpayer in connection with an investigation of its liability for the year 1952. The taxpayer contended, among other things, that its liability for 1950 and 1951 had "been fully examined and settled." (P. 765.) This Court—citing *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5th), certiorari denied, 346 U.S. 864; *Zimmerman* v. *Wilson, supra; Moraine Hotel Co.* v. *Commissioner*, 41 F. 2d 725 (C.A. 7th); and its own decision in *United States* v. *United Distillers Products Corp.*, 156 F. 2d 872—held that the reaching into the records of the earlier years was justified, and that "the present investigation, *being for the 1952 taxes*, is neither barred by limitation *nor settled by the previous examination.*" (Emphasis supplied.) (P. 765.) Similarly, in the instant case, even if it was true (as we do not concede) that the fiscal year 1953 records had been fully examined in connection with the taxpayer's liability for that year, they would still be available for inspection, if germane, in

connection with the taxpayer's liability for the subsequent years under investigation.

III

Enforced Compliance with the Provisions of the Summons Involves No Violation of Constitutional Rights

The taxpayer alleged below (paragraph 3(d) of the notice of motion, Appendix, *infra*) that the contemplated—

> use of the summons powers by the Intelligence Unit of the Internal Revenue Service, which is concerned only with criminal prosecution, represents a clear abuse of administrative powers with respect to a Civil Action and is in violation of petitioner's rights under the Fourth Amendment of the Constitution of the United States.

The implication of the allegation would seem to be that the summons power was being invoked solely or mainly in order to make out a criminal tax case against the taxpayer. This is a naked assertion; there is nothing in the record to support it. The fact that special agents were assigned to the case, along with an internal revenue agent, indicates only that there was a suspicion of fraud, and that the investigation might result in the assertion of the civil fraud penalty only, or the civil fraud penalty plus a recommendation for criminal prosecution, or neither. Even if it is assumed, *arguendo*, that either the primary, or a concomitant, purpose in issuing the summons here was to marshal facts to support a future criminal prosecution, it would by no means follow that the summons provisions could not be invoked to ascertain whether fraud had been committed which, if quantitatively sufficient to support a

charge of criminal tax evasion, would necessarily support the imposition of the civil fraud penalty. Cf. *Helvering* v. *Mitchell*, 303 U.S. 391.

Under the Fourth Amendment, the taxpayer is guaranteed the right to be secure in its papers and effects against unreasonable search and seizure. But to constitute an unreasonable search and seizure within the meaning of the Amendment, the activity complained of must be "out of proportion to the end sought." *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377, 379 (C.A. 2d); see also, *Zimmerman* v. *Wilson*, *supra*, p. 585. We submit, however, that the inspection of the taxpayer's business correspondence and memoranda was not "out of proportion to the end sought," but was germane to the investigation of the taxpayer's liability. Nothing in the record below indicates, for example, that the taxpayer was being "required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds," or that the investigation at bar was a "fishing excursion," or that there was any "oppression, or evidence of any other motive than a lawful investigation." *McMann* v. *Securities and Exchange Commission*, *supra*, p. 379. In the circumstances, paraphrasing what this Court has stated in the *Securities and Exchange Commission* case, p. 379, unless the summons is held to be valid, "it is impossible to see how the * * * [Code provisions] can be enforced at all, or how any wrongdoer can be brought to book."

Finally, it should be noted that in measuring the scope of the investigative power under the summons provisions and in determining the limitations thereupon, the Code provisions "should receive a * * * *liberal* construction in view of the * * * important ends sought

by the government." (Emphasis supplied.) *Brownson* v. *United States*, 32 F. 2d 844, 848; see also, *Falsone* v. *United States*, *supra*, p. 742. "In the absence of a showing of oppressive, unreasonable or unnecessary requirements * * * the weight of authority * * * approves * * * [the] liberal interpretation [of the provisions] as well as enforcement of prompt obedience to the procedure authorized by it." *United States* v. *Peoples Deposit Bank & Trust Co.*, *supra*, p. 724; see also, *First National Bank of Mobile* v. *United States*, 267 U.S. 576. We submit that the observation of this Court in *Bolich* v. *Rubel*, *supra*, is most appropriate here (p. 895.):

> The constitutional objections appear to us frivolous. * * * That repeated scrutiny may become irksome nearly everybody knows from experience; but no constitutional difficulties arise, *none at least until the abuse is far more crying than here*. (Emphasis supplied.)

IV

The Records Requested by the Summons Were Sufficiently Identified and Were Germane to the Inquiry Sought to Be Conducted

The summons issued is this case called for the production of certain materials in connection with the investigation of the taxpayer's "tax liability" for the fiscal years "1953 to 1956, inclusive." Except in so far as they involved the fiscal year 1953 (where objection to the production of the records rested on grounds other than identification and relevance) the taxpayer did not resist the Government's request for production of the following materials specified in the summons (Appendix, *infra*):

> Cash receipts journals, cash disbursements journals, general journals, general ledgers, petty

> cash books and vouchers, payroll books, purchase journals, sales journals, sales returns and allowance journals, accounts receivable ledgers, accounts payable ledgers, sales invoices, purchase invoices (paid bills), bank statements and cancelled checks, * * * minute books, stock ledger or stock book, * * * and any and all books, records * * * of the National Plate & Window Glass Company, Inc.

The taxpayer did, however, resist production of certain other material requested by the summons, namely, (Appendix, *infra*) its "correspondence files" and "memoranda". In its notice of motion the taxpayer alleged (Appendix, *infra*):

> * * * the Commissioner's summons is invalid in so far as it demands all corespondence files, and memoranda of the National Plate & Window Glass Co. Inc. *without specifying which files and memoranda are sought and that such correspondence and memoranda are relevant to the inquiry.* (Emphasis supplied.)

On this appeal, therefore, we need consider the question of identification and relevance only in so far as it concerns the taxpayer's correspondence files and memoranda. With respect to identification, we submit that the request for "correspondence files" and "memoranda" relating to the taxpayer's "tax liability" for the designated taxable years could leave no doubt in the minds of the taxpayer's agents as to what categories of items were sought. Webster's New Collegiate Dictionary (1951) defines the term, "correspondence", as follows: "2. Intercourse between persons by letters. 3. The letters which pass between correspondents.";

the term, "file", as follows: "1. * * * any device, as a folder or cabinet, in which papers are preserved. 2. An orderly collection of papers"; the term, "memorandum", as follows: "1. An informal record of something; a note to help or jog the memory." These definitions, we submit, are widely comprehended, and especially in the business world. On the hypothesis that the correspondence files and memoranda which were kept by the taxpayer in connection with its business activities would shed some light on its tax liability, we submit that the summons described those categories of items "with all of the particularity the nature of the inquiry and the * * * situation would permit." *Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186, 210, fn. 48. The summons could only specify "with reasonable particularity, the subjects to which the documents * * * relate." *Brown* v. *United States*, 276 U.S. 134, 143.

That the identification here was sufficient is conclusively demonstrated, we believe, in *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322. There, the Supreme Court—citing its prior decisions in *Brown* v. *United*, *supra*, pp. 142-143; *Okla. Press Pub. Co.* v. *Walling*, *supra*; and *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509—sustained as sufficiently specific a subpoena issued by the Civil Aeronautics Board, under legislative authority similar to that involved in the instant case, calling for the production of certain designated categories of items, including *correspondence and memoranda*.[12] In reversing the judgment of the Court

[12] The hearing examiner in the *Hermann* case issued a number of subpoenas *duces tecum* directed against a group of individuals and business entities, their officers and employees, and independent auditors and advertising agencies under contract with them. The subpoenas called for the production of the following *categories* of

of Appeals for the Ninth Circuit (*Hermann* v. *Civil Aeronautics Board*, 237 F. 2d 859), the Supreme Court in effect rejected the doctrine, as stated by Judge Fee (237 F. 2d, p. 364), that the court was required, among other things, to pass upon the question "whether individual documents in the possession of the persons to whom the subpoena is directed have been sufficiently defined and described." The effect of the *Hermann* decision was to reject also the similar doctrine announced by Judge Fee in two cases dealing with summonses issued under the provisions of the Internal Revenue Code. See *Local 174 Etc.* v. *United States*, 240 F. 2d 387 (C.A. 9th); *Hubner* v. *Tucker*, 245 F. 2d 35 (C.A. 9th); cf. *Borch* v. *Tucker*, *supra*.

As to whether the correspondence files and memoranda sought in the instant case were *germane* to the investigation, we note, first, that the investigating agents averred that they were. Special Agent Waldman's affidavit alleges (Appendix, *infra*):

> The documents specified in the subpoena are extremely important to the investigation of the Taxpayer in that without production of these books, records, etc., further investigation of the civil and criminal fraud must be suspended. The documents specified in the summons duces tecum are both

documents: (1) financial and corporate records, including personal income tax returns; (2) correspondence, memoranda, and agreements; (3) personnel records; (4) data relating to ownership, identification, and utilization of aircraft and assignment of flight personnel; (5) advertising material disseminated to the public by radio, newspapers, display posters, and business cards; (6) airline tickets, including flight coupons, auditor and agent coupons, and specimens of tickets and exchange orders. *Most of the documents were designated by groups;* particular documents also were specified. See Supreme Court Record, pp. 39-60, *Civil Aeronautics Board* v. *Hermann*, No. 540, October Term, 1956.

> material and relevant to this investigation in that they are necessary to reconstruct the financial history of the corporation, and to ascertain exactly what items were included or excluded in the Taxpayer's returns which should not have been included or excluded.

Internal Revenue Agent Uberall's affidavit stated, in part (Appendix, *infra*):

> The * * * correspondence files * * * and memoranda subpoenaed from the taxpayer are necessary in order to perform a fair and accurate audit of the taxpayer's returns for the fiscal years in question. The information needed and sought herein by the Internal Revenue Service is material and relevant to this investigation as there is every indication and an extremely strong likelihood that the aforementioned documents have an integral bearing on the tax liability of the taxpayer.

While the averments of the Government agents are not necessarily controlling, they are nevertheless generally entitled to considerable weight; especially so in the instant case, in view of the agents' prior experience in investigating the tax liabilities of the related Kirschner corporation and of the individual Kirshners.

In *United States* v. *United Distillers Products Corp.*, 156 F. 2d 872 (C.A. 2d), this court—sustaining the enforcement of an internal revenue summons which called for the production of (p. 874) "All sales invoices, all vouchers supporting the accounts payable ledger and capital and revenue expenditures, and all retained copies of tax returns" on the ground that they were "clearly essential to any thorough tax investiga-

tion"—significantly observed that the Commissioner should not "be required to prove the grounds of its belief prior to examination of * * * records which provide the ultimate proof." See also *Falsone* v. *United States, supra,* in which the Fifth Circuit sustained the Commissioner's right to require a *third party* to produce books, papers, records or memoranda in its files relating to certain individual and corporate income tax returns. "It is not unreasonable to allow the Government to obtain all available information" (*Zimmerman* v. *Wilson, supra*) (page 515); in the nature of things, it cannot be said that the business correspondence and memoranda requested in the instant case have no *general relevancy,* at the least, to its fiscal picture for the first year under investigation, and, for that matter, to the fiscal picture for the subsequent years, as may well be the case if the net worth or other indirect method of ascertaining income should be employed in determining corrected liability for those years. Cf. *Application of United States (Carroll),* 246 F. 2d 762, certiorari denied, 355 U.S. 857, in which this Court held that the Internal Revenue Service was not required, as the taxpayer contended, to introduce evidence in the summons enforcement proceeding on an issue allegedly a prerequisite to investigation. This Court stated that to hold otherwise (p. 765) "would permit the taxpayer to control the course of the investigation", since no one could tell, until "the examination of the taxpayer has been concluded, what may or may not be the interrelation between * * * seemingly separate and distinct matters."

In analagous situations, the Supreme Court has consistently enforced or upheld subpoenas *duces tecum,* designating documents by broad classes, upon a *general*

showing that "the documents sought are relevant to the inquiry." *Okla. Press Pub. Co.* v. *Walling, supra,* p. 209; *Consolidated Rendering Co.* v. *Vermont,* 207 U.S. 541; *Wheeler* v. *United States,* 226 U.S. 478; *Brown* v. *United States, supra; Endicott Johnson Corp.* v. *Perkins, supra; Penfield Co.* v. *Securities and Exchange Commission,* 330 U.S. 585, 591, 592; see *United States* v. *Morton Salt Co.,* 338 U.S. 632, 652.

In the *Endicott Johnson* case, *supra,* the subpoena called for production of "[a]ll time cards, time books, employees' wage statements and payroll records showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the Endicott Johnson Corporation", in specified "factories or departments" and for specified periods ranging from 3 to 23 months (Supreme Court Record, pp. 8-9, No. 142, October Term, 1942). In holding that the Court of Appeals had properly directed enforcement of the subpoena, the Supreme Court ruled (p. 509):

> The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary [of Labor] in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration.

Similarly, in the *Okla. Press* case, *supra,* the subpoena, which the Supreme Court upheld on the ground that "the documents sought are relevant to the inquiry," called for the production of (p. 210, fn. 46)—

> All of your books, papers and documents showing the hours worked by and wages paid to each of

> your employees between October 28, 1938, and the date hereof [October 14, 1943 (Supreme Court Record, p. 11, No. 61, October Term, 1945)], including all pay roll ledgers, time sheets, time cards and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods.

Compare *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, 363; where the Supreme Court, in holding that the Administrator of the Wage and Hour Division of the Department of Labor had no authority to delegate to his subordinates his statutory power under the Fair Labor Standards Act to sign and issue a subpoena *duces tecum*, pointed out that under the Act "the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time."

The standard of relevancy varies "in relation to the nature, purposes and scope of the inquiry." *Okla. Press* case, *supra*, p. 209. Thus, enforcement has been directed or approved upon a showing that the material sought is "not plainly incompetent or irrelevant to any lawful purpose" of the agency (*Endicott Johnson* case, *supra*, p. 509; see, also, *McGarry* v. *Securities and Exchange Commission*, 147 F.2d 389, 392 (C.A. 10)); that it is not "irrelevant to its [the agency's] statutory functions" (*Penfield* case, *supra*, p. 592); that it "related to the subject of inquiry" (*Consolidated Render-*

ing Co. v. *Vermont*, 207 U.S. 541, 554); that it "relate to or touch the matter under investigation * * *" (*Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F. 2d 692, 694 (C.A. 10th)); that it is "probably relevant" to a lawful investigation (*Smith* v. *Porter*, 158 F. 2d 372, 374 (C.A. 9th); certiorari denied, 331 U.S. 816); that it "was not shown to be plainly incompetent or irrelevant" (*Jackson Packing Co.* v. *National Labor Relations Board*, 204 F. 2d 842, 843 (C.A. 5th)); or that the "subpoenas show on their face the probable materiality of the documents sought" (*Hagen* v. *Porter*, 156 F. 2d 362, 365 (C.A. 9th), certiorari denied, 329 U.S. 729). However the test is phrased, this much is clear: the requisite showing of relevancy and materiality applies only to the categories of documents sought, and need not be made in relation to each of the individual documents comprising each category.

In *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541, the Supreme Court upheld a state court judgment holding a corporation in contempt for refusing to obey a grand jury subpoena calling for the production of various books and records covering a 34-month period. In rejecting the contention that the subpoena was too broad the Court stated (p. 554):

> But unless it can be said that the court or grand jury never has any right to call for all the books and papers, or correspondence, between certain dates and certain persons named, in regard to a complaint which is pending before such court or grand jury, we think the objection here made is not well founded. We see no reason why all such books, papers and correspondence which related

> to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.

No less pertinent is the Supreme Court's statement in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642: "Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry."

Questions as to the relevancy and materiality of individual documents first become ripe for determination when the documents may be offered in evidence at a subsequent proceeding; they are not ripe when the District Court is called upon, preliminarily, to enforce summonses or subpoenas covering groups of documents. Cf. *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 44; *Nelson* v. *United States*, 201 U.S. 92, 114. Ordinarily, the materiality or relevancy of particular documents can be precisely determined only in the factual context of subsequent proceedings. "Very often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a file in the mosaic." *In re Edge Holding Corp.*, 256 N.Y. 374, 381. This vital practical consideration lies at the root of the settled rule that enforcement of administrative subpoenas *duces tecum* covering groups

of documents requires only a showing of the general relevancy of the material sought.

Application of this rule here does not mean that the District Court is required to rubberstamp the administrative summonses with approval, since "appropriate defence may be made" to an application for enforcement. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 46. For example, an application may properly be resisted on the ground that the summons is unduly vague or unreasonably burdensome (*Hale* v. *Henkel*, 201 U.S. 43); that it would violate a personal privilege of the witness, like that against self-incrimination (cf. *Boyd* v. *United States*, 116 U.S. 616); or that the summons was not issued by a person authorized to do so (*Cudahy Packing Co.* v. *Holland*, 315 U.S. 357). Furthermore, enforcement may always be opposed on the ground that the evidence sought is plainly irrelevant to any lawful subject of inquiry. See *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 479. Thus, there is ample scope in the proceeding for the enforcement of a summons for the District Court to exercise its discretion to protect against the arbitrary use of the investigative power. But, in the absence of any showing of such arbitrariness (and none has been made in the instant case), the Government is entitled to enforcement.

Requiring the Commissioner to show the relevancy and materiality of each document in order to obtain judicial enforcement of a summons would contravene the requirements of "practicable administrative procedure (*Morgan* v. *United States*, 298 U.S. 468, 481); for such a practice would turn many summons enforce-

ment proceedings into virtually full dress hearings on the merits. The result would be seriously and needlessly to handicap and delay the revenue authorities in effectively exercising the powers which Congress has conferred upon them for obtaining information and, at the same time, to impose heavy burdens upon the courts.

Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals, graphically warned of the dangers to the administrative process which would result if courts attempted to determine the relevancy of particular items of evidence when called upon to enforce subpoenas when he stated (*In re Edge Holding Corp.*, 256 N.Y. 374, 381-382):

> Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ. Prophecy in such circumstances will step into the place that description and analysis may occupy more safely. Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold.

That warning is relevant here; and, by necessary application, it is echoed in the Supreme Court's recent decision in the *Hermann* case, *supra*.

CONCLUSION

The order of the District Court is erroneous and should be reversed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.
LEE A. JACKSON,
HARRY BAUM,
MEYER ROTHWACKS,
Attorneys,
Department of Justice,
Washington 25, D. C.

CORNELIUS WICKERSHAM, JR.,
United States Attorney.
LAWRENCE G. NUSBAUM, JR.,
Assistant United States Attorney.

JANUARY, 1958.

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APPENDIX

[Tr. A-B] M-2120

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

In the Matter of NATIONAL PLATE & WINDOW GLASS, CO., INC.

To quash a Commissioner of Internal Revenue Summons Duces Tecum

DOCKET ENTRIES

June 4, 1957 Notice of Motion and Affidavit filed for an order to quash a summons issued by the Commissioner of Internal Revenue on May 22, 1957 (returnable on June 12, 1957 at 10:00 a.m.)

June 12, 1957. Before Inch, J. Motion adjourned to June 19, 1957 on consent.

June 19, 1957 Before Inch, J. Motion to quash summons argued and submitted Exchange papers June 21, 1957 All papers by June 24, 1957 Affidavit of Murray L. Waldman in opposition filed

June 27, 1957 By Inch, J. Memorandum rendered on motion to quash summons, etc., motion granted without prejudice to the government's legal rights as to the petitioner's tax liability Settle order (see memo on motion papers)

Aug 23, 1957 Notice of Appeal filed (U.S.R.)

Oct 2, 1957 Designation of record on appeal filed.

Dec 2, 1957 Papers, constituting record on appeal were this day handed personally to Lawrence G. Nusbaum, Jr., Assistant United States Attorney, for filing in the United States Court of Appeals.

[Tr. 1-5] [Caption omitted]

NOTICE OF MOTION

SIR:

Please take notice that upon the affidavit of Herbert Kirshner, president of the petitioner herein, duly verified June 3, 1957, the petitioner *will* move this Court at a stated Term for Motions to be held in the Motion Part of the United States Court House, 271 Washington Street, Brooklyn, N. Y., Eastern District of New York, on June 12, 1957 at 10 A.M. in the forenoon of said day or as soon thereafter as counsel may be heard for an order:

1. To quash a summons issued by the Commissioner of Internal Revenue on May 22, 1957 and served on petitioner by his delegate, James A. Duffy, Special Agent, Intelligence Unit, Internal Revenue Service, requiring Herbert Kirshner, president of petitioner corporation, to give testimony relating to the tax liability of petitioner for the fiscal years ended August 31, 1953 through August 31, 1956 inclusive before Special Agent James A. Duffy at 90 Church Street, New York, N. Y., on June 4, 1957, and to produce the following books, records and miscellaneous data:

Cash receipts journals,
Cash disbursements journals,
General journals
General ledgers
Petty cash books and vouchers
Payroll books
Purchase journals,
Sales journals
Sales returns and allowances journals
Accounts Receivable ledgers
Accounts Payable ledgers

Sales invoices
Purchase invoices (paid bills)
Bank statements and cancelled checks
Correspondence files
Minute books
Stock ledger or stock book,
and any and all books, records and memoranda of the National Plate & Window Glass Company, Inc.

2. To grant such further relief as in the judgment of this Court may be required to protect petitioner from illegal acts and harassment by the Commissioner of Internal Revenue or his agents or delegates, and for such other relief as the Court may deem just.

3. As a basis of this motion, petitioner shows the following:

(a) The Commissioner of Internal Revenue on May 22, 1957 has served a summons duces tecum on petitioner, a New York corporation whose principal place of business is within the jurisdiction of this Court and whose Federal income tax returns are filed with the District Director of Internal Revenue, Brooklyn District, requiring it to produce various books, records and other data for the fiscal years ended August 31, 1953 to August 31, 1956 inclusive, and requiring its president, Herbert Kirshner, to give testimony with regard thereto for the purpose of determining its tax liability before Special Agent James A. Duffy, at the Office of the Intelligence Unit of the Internal Revenue Service on Tuesday, June 4, 1957. The specific data requested was listed on pages 1 and 2 herein.

The period for complying with the summons with respect to the fiscal year ended August 31,

1953 has been orally extended by telephone on June 3, 1957 at 9:45 A.M. by Special Agent J. A. Duffy to petitioner's counsel from Tuesday, June 4, 1957 to Wednesday, June 12, 1957.

(b) This request to produce the books, records and other data and to testify in regard thereto covers the fiscal year ended August 31, 1953 despite the fact that the tax liability of petitioner for that year is at issue before the Tax Court of the United States.

(c) There is no provision under the Rules of the Tax Court of the United States for discovery proceedings and the Commissioner of Internal Revenue seeks to avoid the Rules of the Tax Court by the illegal use of the Commissioner's summons in aid of its defense of said Civil Action in the Tax Court of the United States before the actual trial of the action.

(d) Such use of the summons powers by the Intelligence Unit of the Internal Revenue Service, which is concerned only with criminal prosecution, represents a clear abuse of administrative powers with respect to a Civil Action and is in violation of petitioner's rights under the Fourth Amendment of the Constitution of the United States.

(e) Furthermore, this summons was issued in violation of Section 2605(b) of the U. S. Internal Revenue Code of 1954, which provides:

> "Sec. 7605(b)—Restriction on Examination of taxpayer: No taxpayer shall be subject to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer, or unless the Secretary or his delegate after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

The Commissioner of Internal Revenue having made a determniation of the tax liability for the fiscal year ended August 31, 1953 and the case being at issue in the Tax Court of the United States, and no request in writing having been made for an additional inspection as required by Section 7605(b) of said Internal Revenue Code, the demand to examine the records of petitioner for said fiscal year ended August 31, 1953 is clearly illegal.

(f) The Commissioner of Internal Revenue in sending out its 90-day Deficiency Notice and in its answer to petitioner's Petition before the Tax Court of the United States, not having asserted any fraudulent acts of petitioner or alleged fraud, the Intelligence Unit, on information and belief, is without legal authority to require any testimony or records to be produced for said fiscal year ended August 31, 1953 for the purpose of determining petitioner's tax liability.

(g) Furthermore, the Commissioner's summons is invalid in so far as it demands all correspondence files, and memoranda of the National Plate & Window Glass Co. Inc. without specifying which files and memoranda are sought and that such correspondence and memoranda are relevant to the inquiry. For the same reasons, the Commissioner's summons is invalid for the fiscal years ended August 31, 1954 to August 31, 1956 inclusive, in this regard.

Yours, etc.,

BERNARD WEISS,
Attorney for Petitioner,
Office & P.O. Address,
136 East 57th Street,
New York 22, N. Y.

To: Hon. Leonard Moore, Esq., U. S. Attorney for the E.D.N.Y., Office & P. O. Address, 271 Washington Street, Brooklyn, N. Y. —— ——, Asst. Regional Commissioner, Intelligence, 90 Church Street, New York, N. Y.

Dated: June 4, 1957.

Received Jun. 4, 1957. Intelligence Div., Internal Revenue Service, New York Region.

[Tr. 6-9] [Caption omitted]

AFFIDAVIT OF HERBERT KIRSHNER IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of Queens, ss:

HERBERT KIRSHNER, being duly sworn, deposes and says:

(1) He is president of the petitioner, a corporation organized under the laws of the State of New York to engage in the business of distributing glass.

(2) Petitioner's principal place of business is at 139-05 Archer Avenue, Jamaica 35, N. Y.

(3) Petitioner maintains a regular set of books and records pertaining to its business and a regular bookkeeper keeps such records. The records of petitioner are audited by the firm of certified public accountants, Klein & Trachtenberg, who prepared and filed the Federal income tax returns of the corporation from the books and records of the petitioner.

(4) The Federal income tax returns were filed by the petitioner for the fiscal years ended August 31, 1953 through August 31, 1956 with the District Director of Internal Revenue for the District of Brooklyn, N.Y., and all taxes owing were duly paid to the District Director of Internal Revenue for said district.

(5) On or about April 3, 1956, deponent was advised by Jack Klein, its accountant, that Special Agent Murray Waldman had served him with a Commissioner's summons with respect to another corporation of which the deponent is president, and that in that connection Special Agent Murray Waldman requested all work sheets of National Plate & Window Glass Co., Inc. in possession of said Jack Klein, which work sheets were turned over to Special Agent Murray Waldman by said Jack Klein. On information and belief, such demand is clearly illegal and violated petitioner's rights under the Fourth Amendment of the Constitution of the United States.

(6) On or about October 19, 1956, Revenue Agent I. Uberall, of the Office of the District Director of Internal Revenue, Upper Manhattan District, requested that Form 872 be executed by petitioner-corporation for the fiscal year ended August 31, 1953, extending the Statute of Limitations for the Assessment of Additional Taxes to June 30, 1958.

(7) This request was turned over to petitioner's tax attorney, Bernard Weiss, who wrote the District Director of Internal Revenue under date of October 24, 1956 that the petitioner desired to have its books examined by the Internal Revenue Service prior to the expiration of the Statute of Limitations on the assessment of additional income taxes for the fiscal year ended August 31, 1953, and that its accountant, Mr. J. Klein, would be present to assist them in the examination; a copy of said letter is attached to this affidavit.

(8) Thereafter petitioner received a 90-day deficiency notice dated November 14, 1956, and a petition was filed on behalf of the petitioner with the Tax Court of the United States contesting the proposed deficiency and requesting the Tax Court to redetermine the tax liability for the fiscal year ended August 31, 1953. A

copy of the petition, including a copy of the 90-day letter, is submitted herewith and attached to this affidavit.

(9) No written request for a redetermination of the tax liability for the fiscal year ended August 31, 1953 has been made to petitioner by the Commissioner of Internal Revenue since the receipt of said deficiency notice dated November 14, 1956.

(10) Petitioner respectfully objects to the use of illegal methods by the Commissioner of Internal Revenue in violation of petitioner's rights under the Fourth Amendment of the Constitution of the United States, and further alleges on information and belief that the Intelligence Unit of the Internal Revenue Service is without authority to examine the records of petitioner for the fiscal year ended August 31, 1953, since the determination of civil tax liability is not within the province of that unit. Furthermore, there is no showing that fraud exists for said year. To the contrary, the Commissioner of Internal Revenue has not asserted fraud for the fiscal year ended August 31, 1953 in its deficiency notice mailed to the petitioner under date of November 14, 1956.

(11) The petitioner alleges on information and belief that the issuance of such Commissioner's summons is a clear abuse of the administrative processes for by this means the Commissioner of Internal Revenue seeks to obtain discovery proceedings which do not exist under the rules of the Tax Court of the United States.

(12) Furthermore, on information and belief the issuance of the Commissioner of Internal Revenue's summons is illegal in so far as it seeks to circumvent Section 7605(b) of the U. S. Internal Revenue Code of 1954, which sets forth limitations on examination of taxpayers to one inspection per year except on written

application of either the taxpayer or the Commissioner of Internal Revenue after investigation. Since no further written request was made by the Commissioner of Internal Revenue, the summons is clearly illegal for the year ended August 31, 1953.

(13) The request for all correspondence files and memoranda of petitioner contained in the summons is unreasonable and illegal since the summons does not specify the documents sought or the relevancy of the files or memoranda to the proceedings, and petitioner respectfully urges that this request be denied.

WHEREFORE the petitioner urges that an order issue quashing the Commissioner's summons in so far as it applies to the fiscal year ended August 31, 1953 and furthermore that the demand for correspondence, files and memoranda be denied as unreasonable for all years, and that the Court grant such further relief as the Court deems just and that the Court further order that the summons need not be complied with in any respect until the Court shall have, after hearing, ruled on petitioner's motion.

HERBERT KIRSHNER,
President.

NATIONAL PLATE & WINDOW GLASS CO., INC.

Subscribed and sworn to before me this 3rd day of July 1957.

JOHN CINCOTTA, JR.

John Cincotta, Jr., Notary Public, State of New York, No. 30-5697950, Qualified in Nassau County, Cert. Filed in Queens County, Commission Expires March 30, 1958

[Tr. 10] LETTER ATTACHED TO AFFIDAVIT

October 24, 1956.

District Director of Internal Revenue,
484 Lexington Avenue,
New York, N. Y.

Attention of Revenue Agent I. Uberall.

In re National Plate & Window Glass Co. Inc.
139-05 Archer Ave., Jamaica, L. I., N. Y.,
Fiscal year ended 8/31/1953.

DEAR SIR:

Your request that the above-named taxpayer sign Form 872, extending the statute of limitations for the fiscal year ended 8/31/1953 has been forwarded to me for answer.

Please be advised that the records of the corporation may be examined by your agent at the office of the taxpayer at the above address. It is the desire of the taxpayer that its returns be examined within the statutory period.

Power of attorney is submitted herewith.

The regular accountants, Klein & Trachtenberg, will be represented by Mr. Jack Klein, who will be present at the examination of the taxpayer's records in order to assist you. Please call him for an appointment; his telephone number is CO 5-7948 or CO 5-8145.

Very truly yours,

BERNARD WEISS.

BW:D
Enc.

[Tr. 11]

THE TAX COURT OF THE UNITED STATES

Docket No. 65789

NATIONAL PLATE & WINDOW GLASS CO., INC., PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION

The above-named taxpayer hereby petitions this Honorable Court to review the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Symbols WM:AW:R:JLL:sss) dated November 14, 1956, and as a basis of this proceeding alleges as follows:

1. The petitioner is a New York corporation, with principal place of business at 13905 Archer Avenue, Jamaica 35, N. Y. The return for the period herein involved was filed with the District Director of Internal Revenue for the District of Brooklyn, N. Y.

2. The notice of deficiency, a copy of which is attached and marked Exhibit "A", was mailed to the petitioner on November 14, 1956.

3. The deficiency as determined by the Commissioner of Internal Revenue is in income and excess profits taxes for the fiscal year ended August 31, 1953 in the amount of $65,352.14, all of which tax is in controversy.

4. The determination of the tax set forth in said deficiency notice is based on the following errors.

(a) In determining the tax liability for the fiscal year ended August 31, 1953, the Commissioner of Internal Revenue in arriving at the amount of tax-

able income of petitioner, arbitrarily disallowed all deductions claimed on petitioner's income tax return for said year, which is reflected on Form 1120, filed for said year. These deductions consisted of:

Compensation to Officers	$13,572.00
Rent	6,000.00
Salaries and Wages	40,058.31
Bad Debts	1,516.21
Interest	5,568.90
Taxes	1,676.32
Depreciation	2,094.64
Advertising	672.97
Other deductions authorized by law	29,752.56
	$100,911.91

5. The facts upon which the taxpayer relies as the basis for this proceeding are as follows:

(a) The taxpayer filed its income tax returns on an accrual basis of accounting with the fiscal year ended on August 31.

(b) The taxpayer employs a regular bookkeeper and such assistance as may be required from time to time to keep the books and records of the petitioner and to reflect the business transactions of the taxpayer.

(c) These books and records are audited by a Certified Public Accountant who prepares the income tax return of petitioner, based on the results of the taxpayer's transactions as reflected in such records.

(d) The Commissioner of Internal Revenue made no examination of taxpayer's records for the period herein involved but arbitrarily has disallowed the deductions claimed on taxpayer's income tax return for the fiscal year ended August 31, 1953 as reflected in taxpayer's records; such deductions have been enumerated under Item 4-a above.

(e). In determining the taxpayer's net income for said fiscal year ended August 31, 1953, the Commissioner of Internal Revenue asserted the taxpayer's income was being determined on the basis of information in his office. Taxpayer claims there is no statutory authority for the procedure adopted by the Commissioner of Internal Revenue.

WHEREFORE, the petitioner prays that this petition be granted and that there is no deficiency due from petitioner.

BERNARD WEISS,
Counsel for Petitioner,
136 East 57th Street,
New York 22, N. Y.

[Tr. 45]

STATE OF NEW YORK,
County of New York, ss:

HERBERT KIRSHNER, being duly sworn, deposes and states that he is President of the National Plate & Window Glass Co., Inc., and as such is duly authorized to verify the petition; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated are true.

HERBERT KIRSHNER.

SEAL.

Subscribed and sworn to before me this 6th day of February, 1957.

Maurice M. Blumenthal, Notary Public, No. 305-358300, State of New York. Commission expires March 30, 1958.

[Tr. 16] EXHIBIT A TO PETITION

U. S. TREASURY DEPARTMENT
Internal Revenue Service
District Director

In Reply refer to
UM:Au:R
JTL:sss

National Plate and Window Glass Co., Inc.,,
139-05 Archer Avenue,
Jamaica 35, New York.

GENTLEMEN:

The determination of your income tax liability for the taxable year ended August 31, 1953 discloses a deficiency of $65,352.14 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, WASHINGTON 4, D. C., for a re-determination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed agreement form (Form 870) and forward it to the District Director of Internal Revenue, Audit Division, P.O. Box 1706, Grand Central Annex, New York 17, N. Y. The signing and

filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the period *period* terminates 30 days after receipt of the form, or on the date of payment, or on the date of assessment, whichever is the earliest.

Very truly yours,

RUSSELL C. HARRINGTON,
Commissioner.

By District Director of Internal Revenue.

Enclosures

[Tr. 17] STATEMENT

National Plate and Window Glass Co. Inc.
139-05 Archer Avenue
Jamaica 35, New York

TAX LIABILITY FOR THE TAXABLE YEAR ENDED
August 31, 1953

INCOME TAX

Taxable Year Ended	Liability	Assessed	Deficiency
August 31, 1953	$65,512.50	$160.36	$65,352.14

This determination of your income tax liability has been made upon the basis of information on file with the Internal Revenue Service.

A copy of this letter and statement has been mailed to your representative, Mr. Bernard Weiss, 136 East 57th Street, New York, N. Y., in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Adjustments to Net Income

Net income disclosed by return		$534.52
Unallowable deductions and additional income:		
(a) Compensation of officers	$13,572.00	
(b) Salaries and wages	40,058.31	
(c) Rent	6,000.00	
(d) Bad Debts	1,516.21	
(e) Interest	5,568.90	
(f) Taxes	1,676.32	
(g) Depreciation	2,094.64	
(h) Advertising	672.97	
(i) Other deductions	29,752.56	
		100,911.91
Net income adjusted		$101,446.43

Explanation of Adjustments

(a) to (l) inclusive—These deductions claimed on your return have been disallowed to the extent shown, inasmuch as they have not been substantiated as allowable under the provisions of the Internal Revenue Code.

[Tr. 19-22] [Caption omitted]

Affidavit of Murray L. Waldman

State of New York,
County of Kings, ss:

Murray L. Waldman, being duly sworn, deposes and says that:

1. I am a Special Agent for the Internal Revenue Service, and have been employed in the Intelligence Division of said Service since February 14, 1955.

2. I have been entrusted with the duty of performing an investigation to ascertain if the National Plate and Window Glass Company, Inc., hereinafter known as the "Taxpayer," made a fraudulent return so that I may determine whether there exists:

a. Civil Fraud on the part of the Taxpayer, and/or
b. Criminal Fraud on the part of the Taxpayer.

3. While in the performance of my official duties as a Special Agent, I participated in the investigation of Samuel Kirshner and Sons, Inc., Herbert Kirshner, and Alvin Kirshner. The individuals mentioned in the preceding sentence are closely allied to National Plate and Window Glass Company, Inc., in that Herbert and Alvin Kirshner are the principal shareholders of Samuel Kirschner and Sons, Inc., and National Plate and Window Glass Company, Inc.

4. On April 3, 1956, I obtained, from the Taxpayer's accountant, worksheets for the fiscal year ending August, 1953, concerning National Plate and Window Glass Company, Inc., for the purpose of substantiating records of Samuel Kirschner and Sons., Inc. On May 3, 1956, the Taxpayer's accountant, Mr. Jack Klein, of 250 West 57th Street, New York, New York, moved in the United States District Court for the Southern District of New York to have these papers returned to his possession. Said motion was denied by the Court.

5. On January 14, 1957, in the company of Special Agent Duffy, I visited the National Plate and Window Glass Company, Inc., and photostated ledger accounts of that concern in the course of my investigation of Samuel Kirschner and Sons, Inc.

6. On February 28, 1957, I investigated and inspected the books of National Plate and Window Glass Company, Inc., in order to ascertain if any fraud had been committed by that company. That was the first time National Plate and Window Glass Company, Inc., was investigated as a taxpayer.

7. On March 4, 1957, a third party was questioned in regard to the tax liability of the Taxpayer. Said investigation revealed a fraudulent transaction had occurred. Four days subsequent to the third-party investigation, I visited the National Plate and Window

Glass Company, Inc., but was denied the right to inspect documents for the fiscal year ending August, 1953, because agents of the Taxpayer Scotch-taped the 1953 records, thereby making it impossible to perform any investigation for that period.

8. There is reasonable grounds to suspect and probable cause to believe that the Taxpayer has committed fraud in that:

a. Investigations conducted in regard to Herbert Kirshner and Alvin Kirshner reveal closely related taxpayers holding the majority of stock in the two corporations which are in complementary enterprises. The Taxpayer, National Plate and Window Glass Company, Inc., is a middleman, purchasing glass from factories, and distributing this glass to its purchasers, while Samuel Kirschner and Sons, Inc., is a contractor who buys some glass from the Taxpayer. Investigation of Samuel Kirschner and Sons, Inc., has revealed some highly questionable transactions transpiring between the Taxpayer and Samuel Kirschner and Sons, Inc.

b. The accountant's workpapers, used as an aid in preparing the Taxpayer's return for the fiscal year ending August, 1953, reveal specific business transactions of the Taxpayer which were not included in Taxpayer's gross income. Subsequent investigations of some of these specified items substantiate the fact that the Taxpayer failed to include these transactions in his return.

c. Workpapers made by the accountant for the Taxpayer reveal a possible juggling of inventory figures so as to report a lesser amount of gross profits.

d. Commencing with the year 1951 to and including the year 1955, Taxpayer's gross sales have steadily increased, while its gross profits have markedly decreased. The gross sales figures were taken from the Taxpayer's

returns, while the gross profit figure was computed from these returns.

	Gross Sales	Gross Profits
Partnership return—National Glass Co.—1951	$102,089.44	48.8%
National Plate and Window Glass Company, Inc.—9/18/51-8/31/52	413,426.08	19.9%
National Plate and Window Glass Company, Inc.—9/1/52-8/31/53	683,471.45	14.8%
National Plate and Window Glass Company, Inc.—9/1/53-8/31/54	992,264.05	10.6%
National Plate and Window Glass Company, Inc.—9/1/54-8/31/55	868,198.01	14.4%

9. The documents specified in the subpoena are extremely important to the investigation of the Taxpayer in that without production of these books, records, etc., further investigation of the civil and criminal fraud must be suspended. The documents specified in the summons duces tecum are both material and relevant to this investigation in that they are necessary to reconstruct the financial history of the corporation, and to ascertain exactly what items were included or excluded in the Taxpayer's return which should not have been included or excluded.

10. The workpapers of Taxpayer's accountant, Jack Klein, the recorded facts in the books of the closely allied corporation, Samuel Kirschner and Sons, Inc., and the relationship of the stockholders of these corporations indicate an overpowering likelihood that some or all of the requested documents now in the hands of the Taxpayer will bear heavily upon his future civil and/or criminal fraudulent liabilities.

11. The Taxpayer has not been subjected to any untoward hardships or harassments at the hands of the Internal Revenue Service.

12. The Taxpayer has not been indicted by a Federal Grand Jury, nor has any portion of this case been referred to the Department of Justice for any possible future criminal or civil action.

13. I have not completed my report in regard to the Taxpayer, but, in fact, have made only one cursory inspection of the Taxpayer's books and records dealing with the fiscal year ending August, 1953. All other inspections of these documents were made in conjunction with investigating other taxpayers. The investigation of this Taxpayer is still pending before the Intelligence Division of the Internal Revenue Service, and is awaiting further investigation until such time as this motion is decided.

MURRAY L. WALDMAN,
Special Agent,
Intelligence Division,
Internal Revenue Service.

Sworn to before me this 19th day of June, 1957.

PETER A. PASSALAOQUA.

Peter A. Passalaoqua, Notary Public, State of New York, No. 24-3028800, Qualified in Kings County, Cert. filed with Kings and Queens Co. Reg. Commission expires March 30, 1959.

[Tr. 23-24] [Caption omitted]

AFFIDAVIT OF IRVING UBERALL

STATE OF NEW YORK,
County of Kings, ss:

IRVING UBERALL, being duly sworn, deposes and says:

1. I am an Internal Revenue Agent with the Internal Revenue Service, assigned to the office of the District Director, upper Manhattan, and have been so employed since April, 1946.

2. I have been entrusted with performing a field audit on the tax returns of the NATIONAL PLATE AND WINDOW GLASS COMPANY, INC., hereinafter called the taxpayer, for the purpose of ascertaining the correctness of its tax returns for the fiscal years ending 1953, 1954, 1955 and 1956, and determining its liabilities for the corporate income tax for those years.

3. While in the performance of my official duties as a Revenue Agent, I participated in the investigation of SAMUEL KIRSCHNER AND SONS, INC., a corporation closely allied to the taxpayer in that the stockholders of both corporations are virtually the same. The principal stockholders of the above mentioned corporations are HERBERT KIRSCHNER and ALVIN KIRSCHNER.

4. The journals, ledgers, books, vouchers, sales returns, invoices, bank statements and cancelled checks, correspondence files, records and memoranda subpoenaed from the taxpayer are necessary in order to perform a fair and accurate audit of the taxpayer's returns for the fiscal years in question. The information needed and sought herein by the Internal Revenue Service is material and relevant to this investigation as there is every indication and an extremely strong likelihood that the aforementioned documents have an integral bearing on the tax liability of the taxpayer.

5. Although requested, documents relevant to the fiscal year ending August, 1953, as specified in the subpoena, were not forthcoming. For this reason I did not visit the office of the taxpayer. The pertinent books, papers and records, have been withheld from my view and have never been made available for my inspection or investigation.

6. The taxpayer has not been subjected to any un-

toward hardships or harassments at the hands of the Internal Revenue Service.

IRVING UBERALL,
Internal Revenue Agent.

Sworn to before me this 19th day of June, 1957.

WILLIAM H. SPERLING.

William H. Sperling, Notary Public of the State of N. Y., No. 41-9125200, Qualified in Queens County, Certificates filed with Kings and Queens Co. Clk's and Reg. Off. Commission expires March 30, 1958.

[Tr. 25-26] [Caption omitted]

AFFIDAVIT OF SPECIAL AGENT JAMES A. DUFFY

STATE OF NEW YORK,
County of New York, ss:

JAMES A. DUFFY, being duly sworn, deposes and says:

1. I am a Special Agent of the Intelligence Division, Internal Revenue Service, and have been employed in that capacity since May 31, 1946. This affidavit is submitted in opposition to the motion brought by National Plate & Window Glass Company, Inc., for an order to quash a Commissioner's summons issued on June 4, 1957 at 10:00 a.m., insofar as it applies to the fiscal year ended August 31, 1953, and to deny the examination of certain correspondence files and memoranda sought by the summons for all years.

2. The investigation of the tax liabilities of National Plate & Window Glass Company, Inc. was assigned to me on June 7, 1956 and in due course I actively began my investigation in that matter. I was in charge of this investigation and I was working in cooperation

with Special Agent Murray L. Waldman, also of the Intelligence Division, Internal Revenue Service, and with Revenue Agent Irving Uberall, who is assigned to the office of the District Director of Internal Revenue, Upper Manhattan.

3. On May 22, 1957 at 11:05 a.m., I handed to Herbert J. Kirschner, President of National Plate & Window Glass Company, Inc., a Commissioner's Summons, a copy of which is annexed hereto.

4. This summons was issued by me in the performance of my official duties as a special agent of the Intelligence Division, its issuance having been authorized by my superiors in the Intelligence Division. This summons was not issued by me at the behest, or for the benefit, of any other agency of the government.

5. The issuance of a summons, such as is annexed hereto, is a normal, officially authorized, and standard procedure of the Internal Revenue Service in investigations such as is involved herein, and the use of a summons in this investigation is material and necessary for a proper determination of the tax liability of National Plate & Window Glass Company, Inc.

JAMES A. DUFFY.

Sworn to before me this 19th day of June, 1957.

PETER A. PASSALAOQUA.

Peter A. Passalaoqua, Notary Public, State of New York, No. 24-302880, Qualified in Kings County, Cert. filed with Kings & Queens Co. Reg. Commission expires March 30, 1959.

[Tr. 27] U. S. TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE

SUMMONS

National Plate & Window Glass Company, Inc.,
141 East Jericho Turnpike, Mineola, N. Y
139-05 Archer Avenue, Jamaica, Queens, N. Y.

Internal Revenue District of Brooklyn, New York.

Period(s) Fiscal years ended August 31, 1953 to 1956 inclusive.

THE COMMISSIONER OF INTERNAL REVENUE

To: Herbert Kirschner, President, National Plate & Window Glass Company, Inc.

At: 139-05 Archer Avenue, Jamaica, Queens, N. Y.

GREETING: You are hereby summoned and required to appear before James A. Duffy, an officer of the Internal Revenue Service, to give testimony relating to the tax liability and/or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth: Cash receipts journals, cash disbursements journals, general journals, general ledgers, petty cash books and vouchers, payroll books, purchase journals, sales journals, sales returns and allowances journals, accounts receivable ledgers, accounts payable ledgers, sales invoices, purchase invoices (paid bills), bank statements and cancelled checks, correspondence files, minute books, stock ledger or stock book, minute books, and any and all books, records and memoranda of the National Plate & Window Glass Company, Inc.

Place and time for appearance:

At 90 Church Street, New York, N. Y., Room 1009, New York, N. Y., on the 4th day of June, 1957, at 10:00 o'clock a.m.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of Section 7607, Internal Revenue Code of 1954, this 22nd day of May, 1957.

JAMES A. DUFFY.

[Tr. 28]

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code of 1954)

I hereby certify that I served the summons on the reverse hereof

Date summons served: (*Day, month, year*) May 22, 1957.

Time: 11:05 a.m.

How sumons was served (*Check one*)

☒ I handed an attested copy thereof to the person to whom it was directed, Herbert J. Kirschner.

☐ I left an attested copy thereof with the following person at the last and usual place of abode of the person to whom it is directed,

Special Agent,
JAMES A. DUFFY.

Sec. 7603. Service of Summons.—A summons issued under section 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

[Tr. 29] [Caption omitted]

MEMORANDUM OF JUDGE INCH GRANTING MOTION

M-2120

FROM COURT DOCKET:

6/27/57 By Inch J memo rendered on motion to quash summons, etc. Motion granted without prejudice to the government's legal rights as to the petitioner's tax liability. Settle order (see memo on motion papers).

MEMO ON MOTION PAPERS:

"Motion to quash the summons issued by the Commissioner of Internal Revenue, directed to Herbert Kirschner, the president of the Petitioner, on May 2, 1957, is granted, without prejudice to the government's legal rights as to the petitioner's tax liability. Settle order."
6/27/57

(SIGNED) ROBERT A. INCH,
Chief Judge, U.S.D.C.E.D.N.Y.

[Tr. 30] [Caption omitted]

Notice of Appeal

Notice is hereby given that the United States of America, respondent, in the above-captioned case, hereby appeals to the United States Court of Appeals for the Second Circuit from a Memorandum Decision quashing a Commissioner of Internal Revenue Summons duces tecum entered on June 27, 1957.

Dated: Brooklyn, N. Y., August 23, 1957.

Leonard P. Moore,
United States Attorney,
Eastern District of New York,
Attorney for Respondent,
271 Washington Street,
Brooklyn, New York.
By Lawrence G. Nusbaum, Jr.,
Assistant U. S. Attorney.

U. S. GOVERNMENT PRINTING OFFICE: 1958 483592 963

1913

No. 139

Office - Supreme Court, U.S.
FILED
JUN 30 1958
JOHN T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 24913

NATIONAL PLATE & WINDOW GLASS CO., INC.,

Appellee,

v.

UNITED STATES OF AMERICA,

Appellant.

PETITION FOR REHEARING

BERNARD WEISS
Attorney for Appellee
136 East 57th Street
New York 22, N. Y.

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL PLATE & WINDOW GLASS CO., INC., *Appellee,* v. UNITED STATES OF AMERICA, *Appellant.*	No. 24913

PETITION FOR REHEARING

TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE HONORABLE JUDGES THEREOF.

The appellee respectfully petitions this Honorable Court for a rehearing in the appeal of the above-entitled matter, pursuant to Rule 25 of the Rules of this Court, and as a basis of such petition sets forth the following errors of fact and law.

This appeal is from a judgment of this Court decided April 7, 1958, reversing an order of the U. S. District Court for the Eastern District of New York, which Court granted the appellee's motion to quash a Commissioner of Internal Revenue summons issued under Section 7602 of the U. S. Internal Revenue Code of 1954.

I.

In stating in its opinion the following (p. 990)

> "Moreover, the records sought below may well have been pertinent to the investigation of appellee's tax

> liability for 1954-1956. For those liabilities, so far as it appears, no notice of deficiency had been mailed and no petition for review by the Tax Court had been filed. Consequently Section 6212 by its plain terms was inapplicable. Norda Essential Oil & Chemical Co. v. United States, 2nd Cir. F (2d) 764."

This Court was apparently relying upon the evidence in the printed record below which did not contain any facts to the contrary. However, the Court overlooked the statement by the counsel for the appellee upon oral argument to the effect that a statutory notice of deficiency had been received by the taxpayer for the fiscal year 1954 and that a petition for review had been filed with the Tax Court of the United States for that year. Both the Notice of Deficiency and petition for review for the fiscal year 1954 occurred after the argument below and after the filing of the notice of appeal from the decision below by the appellant.

A copy of the petition, the statutory notice of deficiency and the answer of the Commissioner of Internal Revenue covering the fiscal year ended August 31, 1954 are annexed and marked Exhibits 1, 2 and 3, respectively.

In both of the fiscal years 1953 and 1954, therefore, determinations of the tax liabilities had been made by the Commissioner of Internal Revenue and petitions and answers were filed in the Tax Court of the United States. Consequently, this Court was incorrect in its statement that Section 6212 was not applicable to sustain the determination of the Court below. Since Section 6212(c) is specifically applicable, the only basis upon which this Court in its opinion reverses the Court below, notwithstanding Section 6212, is that that Section "does not proscribe resort to subpoena in an effort to ascertain whether fraud exists. Especially is that so when, as here, a possibility of fraud appears. Boren v. Tucker, 9 Circ. 239 F(2d) 767, at page 733. Cf. Application of the United States (Carroll) 2 Cir. 246 F(2d) 762, cert. den. 355 U. S. 857."

In making that statement with regard to the Commissioner's power, this Court could not have taken into consideration the action taken by the Commissioner of Internal Revenue in his answer to the taxpayer's petition in the Tax Court of the United States to review the assessment for the year 1954, which was made at a date subsequent to the affidavits of the Special Agents of the Intelligence Division in this case below. Again, since this Court did not have the benefit of that answer in the record printed on appeal, it could not know except from what had been said in oral argument that the Commissioner of Internal Revenue had disclaimed any allegation of fraud with respect to the year 1954.

Obviously, as indicated by the annexed answer, Exhibit 3, the Commissioner's action subsequent to the proceeding below and for which year like for the year 1953 he likewise made no claim of fraud, effectively removes from consideration by this Court the allegation of the Special Agent below that "possibility of fraud appears."

It is inconceivable that the action of the Special Agents, whose summons is issued in the name of the Commissioner of Internal Revenue under the power given to the Commissioner of Internal Revenue under Section 7602 of the U.S. Internal Revenue Code of 1954, can be supported by an allegation of possible fraud by the Special Agents when *thereafter* in a formal proceeding in the Tax Court the same Commissioner makes no such claim of fraud whatsoever.

The bonafides of the action of the Special Agents in connection with the issuance of the subpoena for the year 1954 at issue in the Tax Court of the United States may very well be questioned by virtue of what the Commissioner of Internal Revenue did in the Tax Court thereafter. Indeed, it would seem clearer than ever that their action is nothing more than a subterfuge to obtain by indirection

what they could not do under the procedures provided for litigants in the Tax Court of the United States.

Even without this additional proof of the non-existence of any claim for fraud for 1954, the District Court was well aware from the evidence before it that as to the fiscal year 1953 the Commissioner likewise made no claim in his answer to the petition of the taxpayer as to any possible fraud.

Consequently, with these new facts before this Court, none of the cases cited in this Court's interpretation of Section 6212 apply. Those cases did not apply because (a) they did not involve an interpretation of Section 6212 but on the contrary, involve an interpretation of Section 7602 as limited by Section 7605(b), and (b) in all of those cases there was a sufficient showing of the existence of probable fraud to warrant further examination.

Obviously, this Court did not intend to interpret Section 6212 as requiring a lesser showing of the existence of probable fraud than the vast majority of cases interpreting the same requirement to warrant a second inspection or examination under Section 7605(b). *Pacific Mills* v. *Kennefick*, 99 F(2d) 188.

In this regard this Court's attention is specifically invited to the recent decision of the First Circuit Court of Appeals in the case of *O'Connor* v. *O'Connell*, 1 A F T R 2nd 58-1209(P. H.) with regard to further examinations under Section 7602 as limited by Section 7605(b).

II.

This Court, in stating that there was not a completed inspection, within the meaning of Section 7605(b), of the books and records of the taxpayer, overlooked the significant fact that a notice of deficiency had been issued by the Commissioner determining the tax for the years 1953 and

1954, and that such determination had been made as a result of a joint investigation by revenue agents and special agents. Having made such a determination and the matter having been placed before the Tax Court of the United States, any further investigation for those years by the Commissioner is unnecessary and not permitted by Section 7605(b). *Pacific Mills* v. *Kennefick*, *supra*. Once the Commissioner has made a determination by the filing of a notice of deficiency for a taxable year, the assumption exists that a sufficient investigation has been made to warrant the notice of deficiency. The failure on the part of the taxpayer to impugn or contravene that determination will result in an absolute judgment against him under Section 6213(c). However, it could not have been the intention of this Court to permit a further examination under Section 7605(b) on the theory that there was still a continuing inspection where the matter had already been placed before the Tax Court of the United States.

III.

In interpreting Section 6214, which permits the Tax Court to assess a deficiency greater than that determined by the Commissioner, to permit the Commissioner to issue a subpoena to examine the books and records of the taxpayer for a year then in issue in the Tax Court, this Court has provided the Commissioner with a power non-existent in the Statute. Particularly in its interpretation of Section 6212 wherein the Commissioner need not even show that a probability of fraud exists, this Court has given the Commissioner of Internal Revenue, a litigant in the Tax Court, a right of discovery which has not been provided by Congress and which is not equally available to the taxpayer, the other litigant to the proceeding. Such an interpretation, it is respectfully submitted, would be a violation of the due process clause of the Constitution.

CONCLUSION

For the reasons hereinbefore set forth, it is respectfully requested that the petition for rehearing be granted.

BERNARD WEISS
Attorney for Appellee
136 East 57th Street
New York 22, N. Y.

CERTIFICATE OF COUNSEL

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Bernard Weiss, being duly sworn on oath, certifies and says that he makes this certificate in compliance with Rule 25 of the Rules of this Court; that in his judgment the within and foregoing petition for rehearing is well founded and not interposed for delay.

BERNARD WEISS

April 17 1958

EXHIBIT 1

IN THE

TAX COURT OF THE UNITED STATES

NATIONAL PLATE & WINDOW GLASS CO., INC., *Petitioner*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent*.	Docket No. 71278

Petition

The above-named taxpayer hereby petitions this Honorable Court to review the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Symbols UM: Au: R: JTL: mw) dated October 28, 1957, and as a basis of this proceeding alleges as follows:

1. The petitioner is a New York corporation with principal place of business at 139-05 Archer Avenue, Jamaica 35, N. Y. The return for the period herein involved was filed with the District Director of Internal Revenue for the District of Brooklyn, N. Y.

2. The notice of deficiency, a copy of which is attached and marked "Exhibit A", was mailed to the petitioner on October 28, 1957.

3. The deficiency as determined by the Commissioner of Internal Revenue is in income and excess profits taxes for the fiscal year ended August 31, 1954 in the amount of $11,203.81, all of which is in controversy.

4. The determination of the tax set forth in said deficiency notice is based on the following errors:

(a) In determining the tax liability for the fiscal year ended August 31, 1954, the Commissioner of Internal Revenue in arriving at the amount of taxable net income of petitioner disallowed without detailed explanation the following items which were deducted by the petitioner:

	Expenses per Books and Tax Return	Amount Disallowed
(1) Salesmen's Expenses	$ 7,087.39	$6,888.71
(2) Traveling & Entert'n'g Exp.	6,968.19	3,940.11
(3) Commissions	7,120.14	6,831.96
(4) Telephone	4,602.55	217.34
(5) Petty cash expenses	*	4,405.67
(6) Freight	32,597.36	318.13
(7) Purchases	830,201.07	835.43
(8) Bad Debts	2,423.71	2,423.71

*There is no account on taxpayer's books called Petty cash expense.

(b) The Commissioner of Internal Revenue has increased taxpayer's taxable income with an item called "Income" without setting forth any details as to what this item represents.

5. The facts upon which the taxpayer relies as the basis for this proceeding are as follows:

(a) The taxpayer files its Federal income tax returns on an accrual basis with a fiscal year ended August 31st.

(b) The taxpayer employs a regular bookkeeper and such other personnel as may be required from time to time to keep the books and records and

such records reflect the business transactions of the petitioner.

(c) These books and records are audited by a certified public accountant, who prepared its income tax returns based on the results of the business operations reflected in such books and records.

(d) The Commissioner of Internal Revenue, while making a detailed examination of the taxpayer's records, has arbitrarily disallowed $6,888.71 out of $7,087.39 of Salesmen's Expenses actually incurred and paid by the taxpayer and reflected in taxpayer's books and records without setting forth the detailed basis for such disallowance.

(e) Of the amount of $6,968.19 claimed by the taxpayer as Travel and Entertaining Expenses, the Commissioner of Internal Revenue similarly disallowed $3,940.11 without setting forth which items are the basis for such disallowance.

(f) Of a total amount of Commissions incurred and paid, aggregating $7,120.14, the Commissioner of Internal Revenue has arbitrarily disallowed $6,831.96 without showing the detailed basis for such disallowance.

(g) The Commissioner of Internal Revenue has disallowed $217.34 of Telephone Expenses of a total of $4,602.57 incurred and paid, without setting forth which item or items are disallowed.

(h) The Commissioner of Internal Revenue has arbitrarily disallowed all expenses paid through Petty Cash without regard to the nature of the expense or the detailed records kept.

(i) The Commissioner of Internal Revenue has disallowed $318.13 of Freight Expenses incurred of

a total of $32,597.36, without stating which item is being disallowed and therefore taxpayer cannot set forth the basis on which it relies.

(j) The Commissioner of Internal Revenue disallowed $835.43 of Purchases, of a total of $830,201.07, without setting forth which item or items are being disallowed and therefore the taxpayer is unable at this time to set forth the facts on which it relies.

(k) The Commissioner of Internal Revenue arbitrarily disallowed all the Bad Debts actually incurred in the regular course of taxpayer's business during the current fiscal year and deducted on its books and on its tax returns. The names and amounts of bad accounts consisted of the following:

Ben Glass	$ 571.13	
Harding	459.54	
Service	392.64	
Wesco	1,000.40	
Total Bad Debts charged		$2,423.71

(l) The Commissioner of Internal Revenue has arbitrarily increased petitioner's taxable income by $2,727.40 without setting forth the basis for such alleged omitted income and therefore petitioner is unable to set forth at this time the facts on which it relies.

WHEREFORE, the taxpayer requests this Honorable Court to grant its petition for a hearing and to determine that there is no deficiency in income tax due for the fiscal year ended August 31, 1954.

BERNARD WEISS
Counsel for Petitioner
136 East 57th Street
New York 22, N. Y.

December 1957

STATE OF NEW YORK }
COUNTY OF QUEENS } ss.:

HERBERT KIRSHNER, being duly sworn, deposes and states that he is President of the National Plate & Window Glass Co., Inc. and as such is duly authorized to verify the petition; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated are true.

/s/ HERBERT KIRSHNER,
Herbert Kirshner

SEAL

Subscribed and sworn to before me this 18th day of December, 1957.

JOHN CINCOTTA
Notary Public
No. 305697950
Nassau County
Cert. Queens County
Expires 3/30/58

EXHIBIT 2

EXHIBIT "A"

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

P.O. Box 1706, Grand Central Annex

New York 17, N. Y.

Office of
Director of Internal Revenue

In replying refer to
UM:Au:R:JTL:mw

October 28, 1957

National Plate & Window Glass Co., Inc.
139-05 Archer Avenue
Jamaica 35, New York

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended August 31, 1954 discloses a deficiency in tax of $11,203.81, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, WASHINGTON 4, D.C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District

of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Very truly yours,

RUSSELL C. HARRINGTON
Commissioner

by KENNETH W. MOE
Director of Internal Revenue

Enclosures:

STATEMENT

NATIONAL PLATE & WINDOW GLASS CO. INC.
139-05 Archer Ave.
Jamaica 35, New York

Tax Liability for the Taxable Year ended
August 31, 1954

INCOME TAX

Liability	Assessed	Deficiency
$12,588.23	$1,384.42	$11,203.81

This determination of your income tax liability has been made upon the basis of information on file with the Internal Revenue Service.

A copy of this letter and statement has been mailed to your representative, Mr. Bernard Weiss, 136 East 57th Street New York, N. Y., in accordance with the instructions set forth in the power of attorney executed by you.

ADJUSTMENTS TO INCOME

Net income disclosed by return		$4,614.73
Unallowable deductions and additional income:		
(a) Sales expenses	$6,888.71	
(b) Travel and entertainment	3,940.11	
(c) Freight	318.13	
(d) Commissions	6,831.96	
(e) Petty cash	4,405.67	
(f) Purchases	835.43	
(g) Telephone	217.34	
(h) Bad debts	2,423.71	
(i) Income	2,727.40	28,588.46
Net income adjusted		$33,203.19

Explanation of Adjustments

(a) to (h) inclusive. These deductions claimed on your return have been disallowed to the extent shown inasmuch as they have not been substantiated as allowable under the provisions of the Internal Revenue Code.

(i) It has been determined that you realized additional taxable income in the amount indicated which you did not report on your return.

Computation of Tax

Net income adjusted	$33,203.19	
Normal tax and surtax—$33,203.19 at 52% less $5,500.00		$11,765.66
Excess profits net income	$33,203.19	
Less: Excess profits credit	25,000.00	
Adjusted excess profits net income	$ 8,203.19	
Excess profits tax at 30%	$ 2,460.96	
Allocable on a 122/365 basis		822.57
Corrected income tax liability		$12,588.23
Income tax previously assessed		1,384.42
Deficiency in income tax		$11,203.81

EXHIBIT 3

TAX COURT OF THE UNITED STATES

NATIONAL PLATE & WINDOW GLASS CO. INC., *Petitioner*, *v.* COMMISSIONER OF INTERNAL REVENUE, *Respondent*.	Docket No. 71278

Answer

THE RESPONDENT for answer to the petition filed in the above-entitled case admits and denies as follows:

1, 2, 3. Admits the allegations of paragraphs 1, 2 and 3 of the petition.

4(a), (b). Denies the allegations of error set forth in subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a). Admits the allegations of subparagraph (a) of paragraph 5 of the petition.

(b) to (l), inclusive. Denies the allegations of subparagraph (b) to (l), inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied and the determination of the respondent be in all things approved.

ARCH M. CANTRALL
Chief Counsel
Internal Revenue Service

OF COUNSEL:

ELMER R. KEMPER
Regional Counsel

JAMES J. QUINN
Special Attorney
Internal Revenue Service
Office of Regional Counsel
90 Church Street, New York, N. Y.